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No. 87-4-CFY
Status: GRANTED

Title: Mark Erick Wheat, Petitioner
v.
United States

Docketed:
June 29, 1987

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Cleary,John J.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jun 29 1987	G	Petition for writ of certiorari filed.
3	Jul 30 1987		Order extending time to file response to petition until August 29, 1987.
4	Aug 28 1987		Brief of respondent United States in opposition filed.
5	Sep 2 1987		DISTRIBUTED. September 28, 1987
6	Sep 24 1987	X	Reply brief of petitioner Mark E. Wheat filed.
7	Oct 5 1987		Petition GRANTED. limited to Question 1 presented by the petition.
			**********
8	Oct 11 1987	D	Motion of petitioner to dispense with printing the joint appendix filed.
9	Nov 2 1987		Motion of petitioner to dispense with printing the joint appendix DENIED.
11	Nov 19 1987		Joint appendix filed.
12	Nov 19 1987		Brief of petitioner Mark E. Wheat filed.
10	Nov 21 1987		Lodging received.
13	Dec 23 1987		Brief of respondent United States filed.
14	Jan 4 1988		Record filed.
		*	Certified copy of original record and C.A. proceedings, 8 volumes, box, received.
15	Jan 5 1988		CIRCULATED.
16	Jan 5 1988		SET FOR ARGUMENT. Wednesday, March 2, 1988. (4th case). (1 hour).
17	Jan 20 1988	X	Reply brief of petitioner Mark E. Wheat filed.
18	Mar 2 1988		ARGUED.

1 pp

PETITION FOR WRIT OF CERTIORARI

No. 87-4

Supreme Court, U.S.
FILED
JUN 29 1987
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Government-sought disqualification of defense counsel in a criminal case, after all potential conflicts were waived, violated the Sixth Amendment right to counsel.
2. Whether the ex parte pretrial conference with defense counsel seriously eroded his independence and advocacy by the court's accusation of current drug use and created a conflict which should have been disclosed to petitioner.
3. Whether there are any limits on prosecutorial plea bargaining that would preclude "package deals" -- reaching an agreement with the defendant only if other defendants also plead guilty.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Mark Erick Wheat, requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **United States v. Mark Erick Wheat.**

OPINION BELOW

The opinion of the Court of Appeals affirmed the conviction and sentence of

petitioner and is officially reported at 813 F.2d 1399 (9th Cir. 1987). A copy of the opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 2 April 1987 the Court of Appeals entered judgment affirming the conviction of the petitioner for conspiracy and possession with intent to distribute marijuana. On 3 June 1987 his Petition for Rehearing and Suggestion for Rehearing En Banc was denied. (Appendix B.) This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

FEDERAL RULES INVOLVED

Federal Rule of Criminal Procedure 43(a):

> **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

Federal Rule of Criminal Procedure 44(c):

> **Joint Representation.** Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

The defendant was charged with conspiracy and possession with intent to

distribute in excess of 1,000 pounds of marijuana (21 U.S.C. 841(a)(1), 841(b)(6), and 846).[1/]

SUPPLEMENTAL STATEMENT OF FACTS

A. PRETRIAL EX-PARTE HEARING WITH DEFENSE COUNSEL.

On 23 May 1985, three months before trial, the district court summoned trial defense counsel to his chambers with notice to the prosecutor but not the petitioner. (23 May 85 RT 102.) The court revealed that a law clerk provided information that defense counsel "currently"[2/] had a significant substance abuse problem (23 May 1985 RT 1). The judge confronted defense counsel with a report that the judge's law clerk "that you are taking[3/] heroin and cocaine" (23 May 1985 RT 2). The court said it did not expect him to admit, deny, or do anything about these charges (23 May 1985 RT 1-2). Defense counsel acknowledged that it was the first time he was "confronted by this officially" (23 May 1985 RT 2) and characterized these as "former problems with liquor and drugs" (23 May 1985) RT 3). The

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1/ The Court of Appeals opinion summarizes the background of this case, but was in error when it said the defendant "was convicted on all counts" (Slip. Op. 6). The record reflects that he was found guilty of Count 1 and Counts 6 through 10, but he was acquitted of Counts 11 and 12 (Docket Entries 12 Supp. 85; ECR 69-70). The Court of Appeals corrected the Slip Opinion to reflect that the defendant "was convicted on six counts."

2/ The trial judge referred to an accusation of current drug usage which implicates present criminal misconduct (21 U.S.C. 841(a), 844). The Court of Appeals opinion overlooked this statement and characterized defense counsel's involvement as "past narcotic and alcohol abuse" and "past abuses" (Slip Op. 11).

3/ Note the present form of the verb.

court directed its inquiry on the defense counsel's "substance abuse problem" and his ability to adequately represent his client (23 May 1985 RT 3). Defense counsel had disclosed to his client that he attended AA but asked that his being summoned for the meeting with the judge not get out or be disclosed to his client. (23 May 1985 RT 4.) Defense counsel recognized he was a "disabled person" (23 May 1985 RT 4) and participated in a local lawyers disability program (23 May 1985 RT 5). Defense counsel inquired of the judge as to a possible accuser (23 May 1985 RT 7-9). Defense counsel inquired of the judge, "How does this affect me? What might I expect, both the good and the bad?" and whether there would be follow up by the judge (23 May 1985 RT 9-10).

B. DISQUALIFICATION RATHER THAN SUBSTITUTION HEARINGS.[4/]

On 22 August 1985, five days before the scheduled trial date of 27 August 1985, attorney Iredale entered a plea of guilty for a co-defendant Bravo which called for a probationary sentence with no more than 30 days confinement (1 RT 4-5). Bravo had no objection to attorney Iredale representing the petitioner (1 RT 11, 16). The prosecutor had a

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4/ The Court of Appeals opinion labeled the proceeding as a substitution proceeding and used "abuse of discretion" as the review standard (Slip Op. 4-6) but then also used the Third Circuit rationale of abuse of discretion to treat disqualification (Slip Op. 7-11). The court would have reached the same result if this had been a disqualification proceeding. The record should be reconsidered by this Court, for it shows the district court's willingness to accept Iredale as the counsel for Wheat, if the Government had no objection. Having the weekend to consider his willingness to tangle with Iredale again, the prosecutor sought his disqualification, and the trial court concurred.

concern about Iredale's representation of Bravo but stated "[t]he government has not specifically made any plans to call him (Bravo) as a witness but that is, of course, always a potential." (1 RT 12-13).

Attorney Iredale had successfully represented another defendant Gomez-Barrajas in a jury trial at which he was acquitted and had reached a settlement in which he plead to one count of tax evasion and would not receive more than 365 days actual confinement.[5/] The

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5/ In Criminal Case No. 85-308-JLI, with the same judge and prosecutor, Gomez-Barrajas on 2 August 1985 was acquitted. In Criminal Case No. 84-1099-JLI Gomez-Barrajas entered a plea of guilty, and on 15 November 1985 he was sentenced to 450 days (with credits would be 365 days) confinement and a probationary term. These matters from the files of the District Court for the Southern District of California may be judicially noticed by this Court. Fed.R. Evid. 201(f); United (Footnote Continued)

prosecutor feared that Gomez-Barrajas might withdraw from this favorable plea bargain (1 RT 12). Attorney Iredale advised the court that Gomez-Barrajas had no objection to Iredale representing the petitioner (1 RT 13).

The district court indicated that it had no objection to Mr. Iredale's appearing for the petitioner if the prosecution had none,[6/] but the court continued the case until the following

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(Footnote Continued)
States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

6/ THE COURT: "If the clients have no objection and he (the prosecutor), I can't conceive that I would have." (1 RT 15.) The court clarified that it was providing additional time [from the Thursday hearing to the following Monday morning] for the prosecutor to have "the opportunity to raise any objections he might have." (1 RT 15.) The district court never allowed time to determine if alternative measures to limit defense counsel to prevent any potential ethical problems would be appropriate in lieu of disqualification.

Monday (26 August 1985) in order to give the Government the opportunity to reflect on the petitioner's request and raise objections (1 RT 14-15).[7/] As to Iredale's legal knowledge an ability and petitioner's desire to have him as counsel, the district court stated:

> Were I in [petitioner's] position I'm sure I would want Mr. Iredale representing me, too. He did a fantastic job in that trial and I'm sure Mr. Wheat would like to have him representing him (1 RT 52).

The following Monday, the prosecution protested the appearance of Iredale and indicated they would call Bravo (1 RT 20). Bravo did testify at trial, but defense counsel had no questions for him.[8/] Gomez-Barrajas was never called by the Government, and there was no need for defense counsel to characterize his role.[9/]

Defense counsel repeatedly asked the court to allow Iredale to take over the case or at least permit him to cross-examine the principal government witness as he did at the former trial (1 RT 2, 1 RT 65, 2 RT 230, 4 RT 647).

7/ The opinion makes no reference to the district court's initial willingness to accept Iredale as the attorney for the defendant absent an objection of the prosecutor. Because the court responded to the prosecution's objection to Iredale rather than acted on its own discretionary authority, the analysis should have been as to disqualification of counsel rather than a denial of substitution, which was the linchpin of the court's analysis.

8/ See note 4, supra.

9/ The Court of Appeals opinion held that Iredale, if defense counsel, "would not have been free to make the same implications had he represented Wheat" (Slip Op. 9). The critical witness was Vidal who Iredale successfully cross-examined in the Gomez-Barrajas jury trial, and defense counsel's references to the absent Gomez-Barrajas were irrelevant at best and potentially damaging to Wheat. Such remarks in the trial of the issue of guilt need not and would not have been made.

REASONS FOR ALLOWANCE OF THE WRIT

A. GOVERNMENT SOUGHT DISQUALIFICATION OF DEFENSE COUNSEL IN A CRIMINAL CASE AFTER ALL POTENTIAL CONFLICTS ARE WAIVED VIOLATES THE SIXTH AMENDMENT RIGHT TO COUNSEL AND CONFLICTS WITH THE PRECEDENT OF THIS COURT.

The two witnesses and the petitioner waived any potential conflicts. The district court, not itself disturbed by Iredale's representation, later adopted the prosecutor's objection. Bravo was not examined by defense counsel, and the prosecution's manipulation of a witness whom he had not previously planned to use was an unfair tactic to disqualify superior defense counsel. The prosecutor never complained of Iredale representing Gomez-Barrajas and Bravo, but only raised the objection when petitioner's case was scheduled for trial.

In **Powell v. Alabama**, 287 U.S. 45, 53 (1932), this Court held:

> It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his choice.

This Court restated this in **Faretta v. California**, 422 U.S. 806, 815 (1975):

> What were contrived as protections for the accused should not be turned into fetters....
>
> ... When the administration of the criminal law ... is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him the exercise of his free choice the right to dispense with some safeguards ... is to imprison a man in his privileges and call it the Constitution. **Adams v. United States ex rel. McCann**, 317 U.S. 269, 279-280 (1942).

Flanagan v. United States, 465 U.S. 259, 268 (1984), acknowledged that the Sixth Amendment right to counsel of choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceedings." **Flanagan** was a Third Circuit case in which

counsel of choice had been disqualified, but this Court granted review.[10/]

The Court of Appeals referred to Cuyler v. Sullivan, 446 U.S. 335, 355 (1980) (Slip Op. 6-7), but this Court held that a defendant had to show actual not potential conflict of interest to be successful on a claim of improper disqualification of defense counsel. 446 U.S. 335, 348. For the opinion to allow Government counsel to disqualify defense counsel for potential conflict of interest, while the defendant can only obtain relief by a showing of actual conflict creates a double standard. At least, a hearing should be held to inquire as to the nature of the actual or potential conflicts that may

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10/ The court never reached the issue, because it held that a pretrial disqualification order was not appealable.

arise so as to fashion a remedy other than Government-sought disqualification of a defendant's choice of counsel.

In **Flanagan** this Court granted certiorari on the issue of disqualification of the counsel of a criminal defendant's choice after others had knowingly waived conflict-free representation as a deprivation of the Sixth Amendment right to the assistance of counsel.[11/] 465 U.S. 259, 262. The Court never reached this fundamental Sixth Amendment issue, which has left the Circuits to develop broad interpretations permitting disqualification. This new Ninth Circuit standard, founded on the Third Circuit's opinion in

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11/ In **Flanagan** the court also had before it the request for simultaneous joint representation as a common defense.

Flanagan,[12/] sacrificed the right to counsel of one's choice to protect trial judges from hard calls. The trial court held no hearing, and the Court of Appeals found no evidentiary hearing on this issue was necessary (Slip Op. 8). The court abdicated its responsibility to scrutinize the Sixth Amendment claim with an overstatement of the problem:

> Reviewing courts should be especially wary of complaints of error when the defendant's substitution request places trial courts in a error no matter which way the courts rule. (Slip Op. 7.)

Ninth Circuit cases reversing convictions where a defendant waived the potential conflict of counsel have not been found.

12/ The reliance on the Third Circuit's opinion as precedent is dubious at most, because this Court reversed and ordered that the appeal be dismissed. 465 U.S. 259, 270.

The right to choose one's attorney in the critical adversarial contest of a criminal jury trial tests the core values of the Sixth Amendment right. If prosecutor's are able to disqualify the best defense advocates, they have unfairly shifted the balance in the contest under the guise they are protecting a defendant's right. This Court needs to clarify standards for disqualification of counsel and to insure that appellate review is greater than a test of abuse of discretion.

B. THE NINTH CIRCUITS ADOPTION OF OPEN-ENDED DISCRETION TO DISQUALIFY DEFENSE COUNSEL IN A CRIMINAL CASE CONFLICTS WITH THE MAJORITY OF OTHER CIRCUITS.[13/]

The Ninth Circuit opinion signals almost impossible appellate review of disqualification of criminal defense counsel with potential conflicts.[14/] No

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13/ The Ninth Circuit Opinion in petitioner's case conflicts with its own recent decision in United States v. Washington, 797 F.2d 1461 (9th Cir. 1986) where the court held that the Government could not disqualify a former federal prosecutor without satisfying the heavy burden that these defense attorneys had acquired confidential information as federal prosecutors about the defendant's case. Unlike the opinion in petitioner's case requiring only a review for "abuse of discretion," the Washington panel required de novo review. 797 F.2d 1461, 1465 n.4.

14/ Although the Court of Appeals makes a reference to the difference between substitution and disqualification, the appellate court uses the same standard which is tested by abuse of discretion. It is in direct conflict with United States v. Hobson, 672 F.2d 825, 827 (11th Cir. 1982) which held:

(Footnote Continued)

less drastic measures are suggested or encouraged. No hearing need be held. The desire or need of the defendant is irrelevant.

The Ninth Circuit did not mention a 12-year-old precedent of United States v. Garcia, 517 F.2d 272, 277 (5th Cir. 1975), which permits a defendant to waive conflicts of interest after a detailed inquiry. See also In re Paradyne, 803 F.2d 604 (11th Cir. 1986) (grand jury type hearing not satisfactory in determining conflict when seeking to disqualify defense counsel).

The Second Circuit also recognizes that the Sixth Amendment protects the

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(Footnote Continued)

"We believe in criminal cases, where the defendant's right to counsel is implicated, the conflict in our prior cases should be resolved in favor of the accused. The "abuse of discretion" standard is simply too deferential for such a fundamental Constitutional right is effected.

defendant's selection of retained counsel, and there must be an inquiry in which the government must establish disqualification. United States v. Armedo-Sarimento, 524 F.2d 591 (2nd Cir. 1975); United States v. Cunningham, 672 F.2d 1064 (2nd Cir. 1982). The Seventh Circuit recently concurred with the Second Circuit in United States v. O'Malley, 786 F.2d 786, 790 (7th Cir. 1986):

> We agree with the Second Circuit that the decision to disqualify an attorney in a criminal case requires an evaluation of the interest of the defendant, the Government, the witness and the public in view of the circumstances of each particular case.

O'Malley also recognized that the defendant may waive his right to effective assistance of counsel in order to proceed with the attorney of his choice. 786 F.2d 786, 789. No inquiry, let alone evaluation, was made as to the

speculative conflicts in petitioner's case. Both the co-defendant's waived any disqualification as well as the petitioner.

The Ninth Circuit opinion cites United States v. Agusto, 675 F.2d 965 (8th Cir. 1982) (Slip Op. 6). In Agusto, one defense attorney had represented six witnesses who would probably testify at trial, and the district court disqualified the defense lawyer although the witnesses filed affidavits that they had not disclosed confidential information to him. The court held the district courts disqualification on the "irrefutable presumption doctrine" was error. 675 F.2d 965, 971-972. When the former client's refused consent, the court held the disqualification was not automatic but still required a "clear

showing."[15/] Agusto articulated the concern of several circuits:

> Assuming a clear showing that interests are adverse, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome than disqualification. 675 F.2d 965, 973.

This court in Flanagan did not reach the issue of disqualification. The disarray among the circuits justifies the intervention of this court to establish some articulable guidelines for the enforcement of fundamental right to and choice of counsel. The Ninth Circuit opinion demonstrates the boundless and all encompassing "abuse of

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15/ "In the criminal context, disqualification on the basis of the attorney's receipt of privileged information from a co-defendant formerly represented by that attorney should only be considered upon a clear showing that the present and former client's interest are adverse." 675 F.2d 965, 973.

discretion" standard of review coupled with any <u>potential</u> conflict permits unbridled removal and undermines the Sixth Amendment protection. In this case the Court disqualified a knowledgeable skilled advocate experienced in the case who would seek no delay, but permitted the continuation of an attorney previously compromised by the court's secret interrogation about his possible drug use. The Sixth Amendment right to counsel should not be so abused, and this court should now resolve the issue it did not reach in Flanagan.

C. <u>THE EX PARTE PRETRIAL CONFERENCE WITH DEFENSE COUNSEL SERIOUSLY ERODED HIS INDEPENDENCE AND ADVOCACY BY THE COURT'S ACCUSATION OF CURRENT DRUG USE AND CREATED A CONFLICT OF INTEREST WHICH SHOULD HAVE BEEN DISCLOSED TO PETITIONER</u>.

The Court of Appeals did not adequately address the seriousness of

the secret confrontation between the trial judge and the defense counsel. Although the trial court told the prosecutor of the meeting, the petitioner was never informed that the judge had heard his counsel was using drugs. The petitioner had a right to be present at such a critical confrontation, or if there was some unique necessity,[16/] the petitioner should have been notified of the conference and furnished a transcript.

Federal Rule of Criminal Procedure 43(a) in insuring presence of the defendant at every stage of the criminal proceeding implements a defendant's

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16/ The reported conference between defense counsel and the trial judge took place three months before the trial. If the court found the meeting to be necessary, there was no excuse for failure to disclose the existence and nature of the hearing long before trial.

right to Due Process under the Fifth Amendment and right to a public trial under the Sixth Amendment.

The petitioner's defense counsel was accused of criminal misconduct that could have led to charges against him. The district judge appeared satisfied with counsel's explanation in overcoming his problem, but the judge was going to make further inquiry and defense counsel gave the names of attorneys on a local bar association program helping him. If the prosecutor learned of these allegations against defense counsel, a criminal investigation could have been initiated. This defense lawyer had a demonstrable conflict of interest in seeking to defend and protect himself while representing petitioner who was charged with drug offenses.

In **Glasser v. United States**, 315 U.S. 60 (1942), this Court found a

conflict in a single lawyer representing two former federal prosecutors and recognized the distraction from representing his first client:

> Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of the first client, when the possibility of that divergence is brought home to the court. 315 U.S, 60, 76.

When the trial judge relayed the accusations, the defense counsel had to defend himself. This distracted from his obligation to be solely the zealous advocate for his client.

In **Wood v. Georgia**, 450 U.S. 261 (1981), this Court recognized the possibility of a conflict of interest between the defendants and their attorney who was hired by their employer. This Court understood the problem of

divided loyalties in that case -- how much more so in this case where the defense attorney is accused of a crime by the trial judge?

The compromised defense attorney expressly requested that attorney Iredale replace him, but he never disclosed the prior meeting with the judge when petitioner and he sought to have Iredale represent petitioner. The court never told the petitioner. If the petitioner would have known of this conflict, he would have been able to seek substitute counsel.

The prejudice was pervasive, for it denied the petitioner conflict-free defense counsel. The conflict was never disclosed to the petitioner. When the petitioner and his conflict-laden attorney sought attorney Iredale, with the petitioner and Iredale's clients on the record voluntarily waiving all

conflicts as to Iredale, the court acting on the Government's motion for disqualification precluded the chosen, conflict-waived, attorney from serving.

D. THE PACKAGE DEAL CONDITIONING PETITIONER'S PLEA BARGAIN UPON THE CO-DEFENDANT ALSO PLEADING GUILTY TRANSGRESSED LEGITIMATE PROSECUTORIAL BARGAINING.

Shortly before trial the prosecutor extended offers to the petitioner and his co-defendant which were characterized by co-defendant's counsel as "substantially different in light years from offers of settlement extended months ago and even as late as last week." (1 RT 68.) The offer to petitioner called for him to plead guilty to two counts with a maximum sentence on one count being five years while a consecutive probationary sentence was to be imposed on the other count (CR 101*). The offer to petitioner was, however, part of "a package deal." (1 RT 67.)

The government indicated it had extended the more lenient offers as part of a package in order to save the court's, counsels', and witnesses' time (1 RT 69). The other part of the government's package was that the co-defendant, Sanchez-Cretin, who was to be tried together with the defendant, must also plead guilty (CR 101*). In return for his guilty plea to one count, Sanchez-Cretin would receive a 13-month sentence (CR 100, 102*). Sanchez-Cretin, however, refused to accept the offer (1 RT 70-71, 74-75).

Petitioner's counsel implored the prosecution to allow the defendant to plead guilty (1 RT 70) and indirectly sought the court's assistance (1 RT 70, 74-75). The government, however, maintained its position and when both defendants did not plead guilty prior to jury selection, the offer evaporated (1

RT 75-76). After jury trial, on the recommendation of the prosecutor, the defendant was sentenced to ten years (6 RT 1020, CR 112).

The "package deal" has never been addressed by the Supreme Court. In **Bordenkircher v. Hayes**, 434 U.S. 357 (1978), the court left open[17/] the question of prosecutorial abuse of forcing a defendant to secure concurrence of other defendants to enter pleas of guilty. The prosecutor is permitted to persuade the defendant by offering options to the defendant, but the Supreme Court has never addressed the right of the prosecutor to use one

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17/ "This case does not involve the constitutional implication of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person other than the accused. . . . " 434 U.S. 357, 264 n. 8.

defendant to attempt to coerce the other. This Court has encouraged and supported plea bargaining, but there must be outer limits of the broad discretion of the prosecutor that must not be transgressed. Our federal criminal justice system disposes of 90 percent of its cases by pleas of guilty; it was inappropriate for the Court of Appeal to refuse to review this unfair bargaining tactic here just because defendants always have the option of going to trial. This persuasive and unfair prosecutorial tactic, the package deal, is deserving of review by this Court.

CONCLUSION

Because of the fundamental Constitutional questions raised, this Court is

requested to issue a writ of certiorari to review petitioner's conviction.

Respectfully submitted,

John L. Cleary

JOHN J. CLEARY
Attorney for Petitioner
Mark Erick Wheat

Dated: 11 June

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MARK ERIC WHEAT, *Defendant-Appellant.*	No. 86-5002 D.C. No. 85-0307-03-JLI OPINION

Argued and Submitted
November 5, 1986—Pasadena, California

Filed April 2, 1987

Before: James R. Browning, Alfred T. Goodwin and Jerome Farris, Circuit Judges.

Opinion by Judge Goodwin

Appeal from the United States District Court
for the Southern District of California
J. Lawrence Irving, District Judge, Presiding

SUMMARY

Criminal Procedure

Appeal from conviction. Affirmed.

Defendant Wheat appeals his convictions for conspiracy to possess in excess of 1,000 pounds of marijuana with intent to distribute and for possessing marijuana with intent to distribute. Wheat was one of 14 defendants charged on counts relating to a marijuana importation and distribution scheme. The codefendants agreed to waive their rights to contest any

APPENDIX A

potential or actual conflicts of interest that developed. The trial court denied Wheat's motion to substitute his attorney for one Eugene Iredale or, in the alternative, to permit Iredale to associate himself with the original attorney on the case. The government objected to the substitution on conflict of interest grounds, noting that Iredale represented two of Wheat's codefendants. At no time did Wheat contend that he wanted Iredale because he was dissatisfied with his present attorney.

[1] The trial court was put in the position of balancing two concerns, the right to representation free of conflicts of interest, and the right to representation of one's choice, knowing that denial of either of these would result in an appeal assigning the ruling as reversible error. Reviewing courts should be especially wary of complaints of error when the defendant's substitution request places trial courts in a position to be whipsawed in the expectation of a guaranteed error no matter which way the courts rule. The court justifiably deferred to strong sixth amendment interests in guarding against potential conflicts that were likely to develop. [2] Wheat does not deny that Iredale received privileged information from his two codefendants; Iredale simply said he did not intend to use any of the privileged communications. The mere possession of a former client's and codefendant's privileged communications poses the precise potential for conflict that the trial court had the discretion to avoid in this instance. This court finds that there was significant potential for misuse of privileged information. [3] Wheat's failure to move for substitution until five days before trial makes it even clearer that the trial court did not abuse its discretion by denying the substitution request. [4] Trial courts have some discretion to override defendants' waivers of the right to conflict-free representation. This court need not decide here whether the potential for an actual conflict must be very likely, rather than highly speculative. The potential that Iredale's defense of Wheat would create a conflict easily met the very likely test. [5] This court's holding encourages trial courts' good practice

in inquiring as to possible conflicts in situations of multiple defendant representation. The inquiry and warning process would have little meaning if the trial court had no discretion to determine that potential conflicts outweighed the defendant's right to counsel of choice. [6] Wheat argues that he was denied his fifth and sixth amendment rights when, three months before trial, the judge conducted an ex parte, in-chambers conference with Wheat's attorney regarding the attorney's past narcotics and alcohol abuse. Wheat did not learn of the conference until after the trial. The conference with the attorney certainly was not within the categories of arraignment, plea, trial, impaneling the jury or sentencing. The question is whether it injected reversible error into the record. [7] This court recommends that judges in such a situation inform both the defendant and opposing counsel and create a record of such conferences. Wheat has alleged no facts indicating prejudice from an intimidated, less-than-diligent defense. Wheat's absence from the conference did not prejudice him, and this court finds that the error, if any, was harmless. [8] Wheat argues that the package-deal plea bargain in which the prosecution's offer of a plea bargain to one defendant is contingent on a codefendant also agreeing to plead guilty should be declared impermissible. Wheat has failed to explain how the package-deal plea bargain offer deprived him of his right to a determination of individual guilt. [9] Wheat argues that the package-deal plea bargains impel defendants to coerce codefendants into pleading guilty. This court and others have recognized this potential problem. But instead of declaring such plea bargains per se impermissible, this court enforces a trial judge's duty to ensure that such pleas are voluntary. [10] Wheat cannot complain that there was any coercion here, because neither he nor his codefendant accepted the plea bargain offer. [11] Because there is no right to a plea bargain, and because Wheat does not contend that he or his codefendant were coerced into pleading guilty, his arguments fail.

COUNSEL

John J. Cleary, San Diego, California, for the defendant-appellant.

Roger W. Haines, Jr., San Diego, California, for the plaintiff-appellee.

OPINION

GOODWIN, Circuit Judge:

Mark Eric Wheat appeals his convictions for conspiracy to possess in excess of 1,000 pounds of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846; and for possessing marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Wheat was one of 14 defendants charged on counts relating to a marijuana importation and distribution scheme that spanned nearly three years. Wheat stored massive marijuana deliveries — as much as a ton or more at a time — at his house in Escondido, California.

Wheat contends: (1) that the trial court erred in denying his motion to substitute his attorney when he waived his right to conflict-free representation; (2) that he had a right to be present at, or to be informed about, the district judge's ex parte discussion with Wheat's attorney regarding that attorney's drug and alcohol abuse; and, (3) that package-deal plea bargains should be declared illegal.

I. Substitution of Attorney

The trial court balanced two sixth amendment rights: (1) the qualified right to be represented by counsel of one's choice; (2) and the right to a criminal defense conducted by an attorney who is free of conflicts of interest. The codefendants agreed to waive their rights to contest any potential or actual conflicts of interest that developed. The trial court did not abuse its discretion in overriding the waiver and denying Wheat's substitution motion.

Wheat moved to replace his original attorney of choice with Eugene Iredale, or, in the alternative, to permit Iredale to associate himself with the original attorney on the case. The government objected to the substitution on conflict of interest grounds, noting that Iredale represented two of Wheat's codefendants. At no time did Wheat contend that he wanted Iredale because he was dissatisfied with his present attorney. Rather, the record indicates that Wheat was impressed by Iredale's representation of Wheat's codefendants, and desired to benefit from his expertise.

Wheat first made the substitution request five days before trial. The request was made immediately after Javier Bravo (one of the two codefendants represented by Iredale) pleaded guilty to count one of the superseding indictment. The parties dispute whether the government originally planned to call Bravo as a witness in Wheat's trial or decided to call Bravo in order to manufacture conflicts to keep Iredale out of Wheat's case. Iredale maintained that no conflict would arise because Bravo's testimony — that he never knew or met Wheat in the marijuana distribution network — would not be adverse to Wheat.

The government also expressed concern over the potential conflict of interest regarding Iredale's other client, Juvenal Gomez-Barajas. Gomez-Barajas had already been acquitted on drug charges overlapping with the charges against Wheat. Gomez-Barajas had pleaded guilty, however, to charges of tax evasion and illegal importation of merchandise. The government contended that a conflict between Wheat and Gomez-Barajas could arise if Gomez-Barajas withdrew his guilty plea before sentencing, and then proceeded to trial. The prosecution contended that Wheat might have to testify about

Gomez-Barajas' marijuana dealings relating to the income tax evasion charge on the question of Gomez-Barajas' net worth. Finally, the government noted that witnesses in Gomez-Barajas' marijuana trial had referred to Wheat more than 30 times, thus demonstrating a relationship between Gomez-Barajas and Wheat.

Despite the potential conflicts, Wheat, Gomez-Barajas, and Bravo agreed to waive any rights arising out of any potential or actual conflicts of interest. The court overrode these purported waivers and refused to permit Iredale to represent Wheat. Wheat proceeded to trial with his original lawyer and was convicted on all counts.

Discussion

Within sixth amendment limits, substitution of counsel is discretionary. We review for abuse of that discretion. *United States v. Whaley*, 788 F.2d 581, 583 (9th Cir. 1986).

The sixth amendment provides that criminal defendants who can afford retained counsel have a qualified right to counsel of their choice. *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984). The right is qualified by the need to avoid undermining public confidence in the integrity of the legal system. *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986). Wrongful denial of this qualified right is reversible error even without a showing of prejudice. *Washington*, 797 F.2d at 1467. "A facet of the right to counsel of choice is the defendant's ability to waive his right to the assistance of counsel unhindered by a conflict of interest, provided that waiver is knowing and intelligent." *United States v. Agosto*, 675 F.2d 965, 969-70 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982).

But the sixth amendment also guarantees each criminal defendant the right to assistance of counsel "unhindered by a conflict of interests." *Cuyler v. Sullivan*, 446 U.S. 335, 355

(1980) (Marshall, J., concurring in part and dissenting in part), quoting *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978)).

[1] The trial court was put in the position of balancing the two concerns — the right to representation free of conflicts of interest, and the right to representation of one's choice — knowing that denial of either of these would result in an appeal assigning the ruling as reversible error. Reviewing courts should be especially wary of complaints of error when the defendant's substitution request places trial courts in a position to be whipsawed in the expectation of a guaranteed error no matter which way the courts rule. *Cf. United States v. Jones*, 512 F.2d 347, 350-51 (9th Cir. 1975). The court justifiably deferred to strong sixth amendment interests in guarding against potential conflicts that were likely to develop.

A. *Was there a Potential Conflict of Interest?*

Most appeals involving conflict of interest claims by criminal codefendants arise following trial. *See Agosto*, 675 F.2d at 970. This case, however, deals with the conflict of interest concern prospectively, when the trial court has power to avoid potential conflicts that might otherwise result in reversible ineffective assistance of counsel. We recognize that determining whether codefendants' interests will be adverse is difficult before trial. *See United States v. Dolan*, 570 F.2d 1177, 1181-82 (3rd Cir. 1978).

In successive representation, conflicts of interest arise if an attorney reveals privileged communications of the former client, or otherwise divides his loyalties so that he is incapable of diligently representing his client. *See Trone v. Smith*, 621 F.2d 994, 998-99 (9th Cir. 1980). The government argues that such conflicts were either actually present or very likely to develop had Iredale represented Wheat.

Wheat argues that any alleged conflicts were speculative at most. He argues that his sixth amendment right to counsel of

choice demands closer scrutiny of the alleged conflicts, relying on *Washington*, 797 F.2d 1461 (decided after Wheat's conviction). In *Washington*, we vacated a ruling disqualifying retained counsel on conflict of interest grounds, and remanded for a finding of fact on whether one of the retained lawyers actually received confidential information. *Id.* at 1466-67.

[2] We need not remand this case for an evidentiary hearing, however, because Wheat does not deny that Iredale received privileged information from his two codefendants; Iredale simply said he did not intend to use any of the privileged communications from Bravo in cross-examination. The mere possession of a former client's and codefendant's privileged communications poses the precise potential for conflict that the trial court had the discretion to avoid in this instance. Iredale could have misused those communications in cross-examining Bravo and Gomez-Barajas in Wheat's trial, which is a matter "substantially related" to the proceedings involving his codefendants.[1] Likewise, had Iredale represented Wheat he could have received privileged information from Wheat that could have been misused in later representations of Gomez-Barajas and Bravo. Hence, we find there was a significant potential for misuse of privileged information.

Wheat next argues that Iredale's representation would not have created any conflicts because the interests of the three codefendants were not adverse. The government disputes this, pointing out that Bravo's testimony corroborated two overt acts from Wheat's indictment. At oral argument the assistant United States attorney said that Wheat's original attorney implied that Gomez-Barajas was much more culpable in the marijuana distribution scheme than Wheat. Because of Iredale's continuing ethical duty to his client,

[1]A substantial relationship between successive representations often triggers concerns about divided loyalties and conflicts of interest. *See Trone*, 621 F.2d at 999; Model Rules of Professional Conduct Rule 1.9 (1983).

Gomez-Barajas, he would not have been free to make the same implications had he represented Wheat. This argument strongly supports the trial court's action.

[3] Wheat's failure to move for substitution until five days before trial makes it even clearer that the trial court did not abuse its discretion by denying the substitution request. *See United States v. Michelson*, 559 F.2d 567, 571-72 (9th Cir. 1977) (trial court did not abuse its discretion in denying a request to remove defendant's attorney, because of alleged nonsympathy as to one of defendant's defenses, when the request was made on the Friday preceding the Monday set for trial); *United States v. Harris*, 501 F.2d 1, 5 (9th Cir. 1974).

B. *Waiver of Right to Conflict-Free Representation*

Ninth Circuit waiver cases either involve the trial court's acceptance of the defendant's knowing and intelligent waiver, *United States v. Partin*, 601 F.2d 1000, 1007 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980), or the disqualification of counsel in the absence of waiver where a probability of conflicts exists. *See, e.g., United States v. Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978).

The Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475 (1978), held that the sixth amendment demands that a trial court may not ignore counsel's repeated complaints about conflicts of interest, without either appointing separate counsel or determining that the conflict risk is too remote to warrant separate counsel. *Id.* at 484. This holding implies that the trial court has the discretion to deny a substitution request on conflict grounds even if counsel assures the court that no conflict exists and the codefendants waive their conflicts claims. The court may properly exercise this power partly because defendants may not be able to appreciate the significance of a waiver in light of potential conflicts. *Dolan*, 570 F.2d at 1181. *See generally* Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional*

Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 140-42 (1978); J. Burkoff, *Criminal Defense Ethics Law and Liability,* §§ 7.3, 8.3 (1986). We are also concerned about securing a knowing waiver from codefendants represented by one attorney, because of possible manipulation of testimony resulting from agreements between various clients, lawyers, and possible third persons not before the court. "Because the conflicts are often subtle it is not enough to rely upon counsel, who may not be totally disinterested, to make sure that each of his joint clients has made an effective waiver." *United States v. Lawriw,* 568 F.2d 98, 104 (8th Cir. 1977), *cert. denied,* 435 U.S. 969 (1978).

The cases are not unanimous about when a trial court may override a defendant's knowing waiver. The Third Circuit has held that a trial court may override a waiver when the potential of an actual conflict of interest is "very likely," but not where the potential is "highly speculative." *United States v. Flanagan,* 679 F.2d 1072, 1076 (3d Cir. 1982), *rev'd on other grounds,* 465 U.S. 259 (1984);[2] *Dolan,* 570 F.2d at 1184 (actual conflict of interest will outweigh defendant's waiver).[3] In the Sixth Circuit the standard is higher. Even where there is an actual conflict, a trial court should override a defendant's knowing waiver only in "compelling circumstances." *United States v. Reese,* 699 F.2d 803, 805 (6th Cir. 1983).

[4] We hold that trial courts have some discretion to override defendants' waivers of the right to conflict-free representation. We need not decide here whether the potential for an actual conflict must be "very likely," rather than "highly speculative." *Flanagan,* 679 F.2d at 1076. Here, the potential that Iredale's defense of Wheat would create a conflict easily met the "very likely" test. The trial court, therefore, did not abuse its discretion in refusing Wheat's substitution request.

[5] Our holding encourages trial courts' good practice in inquiring as to possible conflicts in situations of multiple defendant representation. *See Willis v. United States,* 614 F.2d 1200, 1206 (9th Cir. 1979); Fed. R. Crim. P. 44(c). The inquiry and warning process would have little meaning if the trial court had no discretion to determine that potential conflicts outweighed the defendant's right to counsel of choice.

II. Appellant's Absence During Judge's Conference With Counsel

[6] Wheat argues that he was denied his fifth and sixth amendment rights when, three months before trial, the judge conducted an ex parte, in-chambers conference with Wheat's attorney regarding the attorney's past narcotics and alcohol abuse. Wheat did not learn of the conference until after the trial, even though he knew of the attorney's past abuses. He now contends that he would have changed counsel had he known of the conference, out of concern that his attorney would be unduly intimidated by the judge. He cites Rule 43(a) of the Federal Rules of Criminal Procedure: "[t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." The conference with the attorney certainly was not within the categories of arraignment, plea, trial, impaneling the jury or sentencing. The question is whether it injected reversible error into the record.

The presence requirement of Rule 43 "is broader than the sixth amendment right to confrontation and the fifth amend-

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[2]We agree with the Third Circuit that the right to proceed *pro se* (recognized in *Faretta v. California,* 422 U.S. 806 (1975)), "does not imply a constitutional right to waive conflict-free representation by counsel. A defendant's decision to proceed with joint counsel in the face of possible conflicts implicates more considerations and affects more people than does a decision to proceed *pro se.*" *Flanagan,* 679 F.2d at 1076 n.5.

[3]Both *Flanagan* and *Dolan* involved disqualification in the simultaneous representation of criminal defendants, while the instant case is one of successive representation. We see no reason to distinguish between the successive and simultaneous representation cases on courts' power to override codefendants' waivers, as the rationale and policies are virtually identical. *See* Burkoff, § 8.3(b) at 8-15.

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ment due process rights." *United States v. Christopher*, 700 F.2d 1253, 1261-62 (9th Cir.), *cert. denied* 461 U.S. 960 (1983). Due process does not assure the privilege of presence when presence would be useless. *Id.* at 1262 (citations omitted). A violation of Rule 43 does not require reversal unless a reasonable possibility of prejudice is shown. *United States v. Birges*, 723 F.2d 666, 670 (9th Cir. 1984). In this case, Wheat's only claim of prejudice is that he would have sought a different attorney had he known of the judge's conference because he would have been concerned that his attorney might be unduly intimidated by the judge.

[7] We recommend that judges in such a situation inform both the defendant and opposing counsel and create a record of such conferences. Wheat, however, has alleged no facts indicating prejudice from an intimidated, less-than-diligent defense. He merely speculates that he might have chosen other counsel had he known of the trial judge's conference with his attorney. Therefore, his absence from the conference did not prejudice him, and we find that the error, if any, was harmless.

III. Package-deal Plea Bargain

[8] Finally, Wheat argues that "package-deal" plea bargains — in which the prosecution's offer of a plea bargain to one defendant is contingent on a codefendant also agreeing to plead guilty — should be declared impermissible. He contends that the government's package-deal, or "all-or-nothing," plea bargain wrongfully prevented him from pleading guilty. — He does not explain how he would have benefited from making his own bargain with the prosecutor, but argues that conditioning a plea bargain on the cooperation of a codefendant violates the fundamental tenet of our criminal justice system that guilt is individual. He cites *United States v. Rodriguez*, 761 F.2d 1339, 1341 (9th Cir. 1985). *Rodriguez*, however, stands for the proposition that there must be sufficient evidence to find each codefendant guilty beyond a reasonable doubt and that one may not be convicted on grounds of guilt by association. *Id.* Here, the government's plea bargain offer had nothing to do with establishing guilt by association. Wheat's codefendant, Sanchez-Cretin, was indicted on separate counts and convicted in a separate verdict.[4] Wheat has failed to explain how the package deal plea bargain offer deprived him of his right to a determination of individual guilt.

[9] Second, Wheat argues that package-deal plea bargains impel defendants to coerce codefendants into pleading guilty. Our court and others have recognized this potential problem. But instead of declaring such plea bargains per se impermissible, we enforce a trial judge's duty to ensure that such pleas are voluntary, as required by Fed. R. Crim. P. 11(d). *See United States v. Castello*, 724 F.2d 813, 814-15 (9th Cir.), *cert. denied* 467 U.S. 1254 (1984). We have also demanded that such pleas be voluntary in the related situation where a plea bargain is offered in exchange for a promise of leniency as to a third person. *Id.*; *Johnson v Wilson*, 371 F.2d 911, 912 (9th Cir. 1967). The voluntariness test adequately protects the criminal defendant's due process rights, while, at the same time, preserving the benefits of the plea bargaining process. *See Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-62 (1971).

[10] Wheat cannot complain that there was any coercion or element of involuntariness here, because neither he nor his codefendant accepted the plea bargain offer. Rather, Wheat's argument amounts to a request for a declaratory judgment that all package-deal plea bargains are illegal. Wheat's argu-

[4] The government also points out that had Wheat and Sanchez-Cretin accepted the government's offer, safeguards in the plea bargaining process protect against a finding of guilt by association. *See* Fed. R. Crim. P. 11(c), (d); *McCarthy v. United States*, 394 U.S. 459, 464-67 (1969)(district judge must directly inquire of defendant pleading guilty as to whether the defendant understands the nature of the charge against him and the consequences of his plea).

ment is that he was forced to go to trial because the plea bargain depended upon the occurrence of an event that he could not control. In effect, he says he was punished for something that he did not do and could not control. Wheat cites no authority for this novel theory.

Defendants have no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Neither must the prosecutor reoffer a previously rejected plea offer. *United States v. Osif*, 789 F.2d 1404, 1405 (9th Cir. 1986).

[11] Because there is no right to a plea bargain, and because Wheat does not contend that he or his codefendant were coerced into pleading guilty, his arguments fail.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARK ERICK WHEAT, Defendant-Appellant.	No. 86-5002 D.C. No. 85-0307-03-JLI O R D E R FILED JUN - 3 1987

Before: BROWNING, Chief Judge and GOODWIN and FARRIS, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing and no active judge called for a vote on whether to rehear the matter en banc. (Fed.R.App.P. 35.)

The petition for rehearing is denied the suggestion for rehearing en banc in rejected.

APPENDIX B

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
AUG 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-4

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARK ERICK WHEAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly declined to permit the substitution of counsel shortly before trial, where the new counsel already represented two other defendants charged with the same offenses and where one of the new counsel's clients was expected to testify for the government.

2. Whether petitioner was prejudiced by his absence from a conference three months before trial at which his attorney and the trial judge discussed the attorney's past alcohol and drug abuse.

3. Whether the government's offer of a "package deal" plea bargain to petitioner and a co-defendant violated petitioner's rights.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-4

MARK ERICK WHEAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 813 F.2d 1399.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1987 A petition for rehearing was denied on June 3, 1987 (Pet. App. B). The petition for a writ of certiorari was filed on June 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiring to possess more than 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and on five counts of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to ten years' im-

[1] Petitioner was acquitted on one substantive count, as well as on a charge of conspiring to import marijuana.

prisonment and a $125,000 fine. The court of appeals affirmed (Pet. App. 1-14).

1. The evidence at trial, the sufficiency of which is not challenged here, showed that petitioner was part of a large-scale marijuana distribution scheme. From September 1981 through June 1984, petitioner received and stored some 12 tons of marijuana at his home. Most of the individual shipments exceeded one ton. He then distributed that marijuana to the conspirators' customers. Victor Vidal, who was a key government witness at petitioner's trial, was petitioner's immediate supplier. Vidal worked for, among others, co-defendant Juvenal Gomez-Barajas.[2]

On the Thursday before the scheduled Tuesday trial date, co-defendant Javier Bravo pleaded guilty to the conspiracy charge. Immediately after Bravo entered his plea, Eugene Iredale, Bravo's attorney, moved to substitute himself as petitioner's attorney in place of petitioner's retained lawyer, or in the alternative to add himself to petitioner's defense team (Pet. App. 5). Iredale asserted that Bravo did not object to Iredale's representing petitioner.

The prosecutor expressed concern that Iredale already represented both Bravo and Gomez-Barajas, who had been acquitted on the conspiracy charge in a separate trial but had entered a guilty plea to other related charges. Gomez-Barajas and Bravo were both awaiting sentencing. The prosecutor pointed out that in the course of Gomez-Barajas's trial on the conspiracy charge, attorney Iredale had repeatedly referred to petitioner during his cross-examination of Vidal (Tr. 12). In addition, the prosecutor stated that although the matter was not settled, because Bravo had just pleaded guilty, there was a possibility that Bravo would be called as a government witness at trial (*ibid.*). The district court set a hearing on the substitution

[2] The factual summary is based on the government's brief in the court of appeals.

motion for the following Monday, the day before trial.

At the hearing, the government objected to the proposed substitution of counsel. The prosecutor pointed out that over the weekend co-defendant Bravo had agreed to testify for the government at petitioner's trial and that he would provide evidence adverse to petitioner. The prosecutor also said that the government's position was that Gomez-Barajas was petitioner's ultimate supplier of marijuana, and that attorney Iredale's joint representation of both defendants would inevitably result in a serious conflict of interest on Iredale's part. Iredale represented to the court that all three defendants would waive any conflicts of interest arising from Iredale's joint representation (Tr. 13, 24, 43). The district court concluded, however, that there would be an irreconcilable conflict of interest facing any attorney who attempted simultaneously to represent Bravo, Gomez-Barajas, and petitioner (Tr. 37). The court therefore denied the motion, but granted a three-day continuance of the trial to petitioner's retained lawyer (Tr. 42).[3]

2. a. The court of appeals affirmed (Pet. App. 1-14). First, it held that the district court did not abuse its discretion in declining to allow the substitution or addition of Iredale as trial counsel for petitioner (*id.* at 6-11). The court noted that, in the Ninth Circuit, the wrongful denial of a defendant's request to be represented by retained counsel of his choice constitutes reversible error without the need for a showing of prejudice (*id.* at 6). In this case, however, the court held that the denial of the substitution

[3] Petitioner's retained attorney pointed out to the court that petitioner had not complained about the quality of his representation. Rather, counsel had himself advised his client to make the substitution, because he thought it was advisable to have Iredale's assistance (Tr. 52).

motion was not wrongful. The court explained that a defendant's right to counsel of his choice is "qualified by the need to avoid undermining public confidence in the integrity of the judicial system" (*ibid.*). In this case, the court of appeals stated, the district court "was put in the position of balancing * * * two concerns—the right to representation free of conflicts of interest, and the right to representation of one's choice—knowing that denial of either of these would result in an appeal assigning the ruling as reversible error" (*id.* at 7).

The court of appeals concluded that in the circumstances of this case, the trial court "justifiably deferred to strong sixth amendment interests in guarding against potential conflicts that were likely to develop" (Pet. App. 7). The court noted that it was undisputed that Iredale had received privileged information from co-defendants Bravo and Gomez-Barajas that could have been misused in defending petitioner. Furthermore, the court observed, since Bravo and Gomez-Barajas had not yet been sentenced, Iredale "could have received privileged information from [petitioner] that could have been misused in later representations of Gomez-Barajas and Bravo." *Id.* at 8. The court of appeals also stressed that Iredale would not have been free to make arguments as to the relative culpability of the three defendants at sentencing or before the jury in petitioner's case. Since the interests of the three co-defendants were so plainly adverse, the court rejected petitioner's claim that the conflict of interest facing Iredale was speculative, and instead found that there was a "significant potential" for misuse of privileged information that precluded the proposed triple representation. *Id.* at 8-9.

The court of appeals held that even though Iredale represented that all three of his clients would waive their right to conflict-free counsel, the district court was not compelled to permit Iredale to represent petitioner. The

court observed that district courts must have "some discretion" to override waivers of the right to conflict-free representation, both "because defendants may not be able to appreciate the significance of a waiver in light of potential conflicts" and to avoid "possible manipulation of testimony resulting from agreements between various clients, lawyers, and possible third persons not before the court" (Pet. App. 9-10). Since the potential for an actual conflict of interest in the course of Iredale's representation of petitioner was "very likely," the court of appeals held that the district court did not abuse its discretion in declining to allow substitution of Iredale as petitioner's attorney on the eve of trial (*id.* at 10-11).

b. The court of appeals also rejected (Pet. App. 11-12) petitioner's claim that his absence from a private, off-the-record conference between the trial judge and petitioner's lawyer some three months before trial violated petitioner's rights under Fed. R. Crim. P. 43(a). At that ex parte conference, the judge questioned counsel about counsel's past problems with drugs and alcohol. The court of appeals noted (Pet. App. 11) that the conference was not one of the proceedings specified in Rule 43(a) at which the presence of the defendant is required. The court further noted that petitioner had failed to show even "a reasonable possibility of prejudice" stemming from his absence. Petitioner already knew of his attorney's previous substance abuse, and the court rejected as "merely speculative" petitioner's suggestion that he might have chosen different counsel out of fear that his original attorney had been "intimidated" by the trial judge. *Id.* at 12. The court of appeals did recommend, however, that if a similar situation were to arise in the future, the trial court should inform both the defendant and opposing counsel and create a record of the conference (*ibid.*).

c. Finally, the court rejected (Pet. App. 12-14) petitioner's claim that the government violated his rights by

offering him a "package deal" plea bargain, whereby the offer of a plea bargain to petitioner was contingent on his one remaining co-defendant's also agreeing to plead guilty. Noting that petitioner did not in fact plead guilty, and thus could not claim that he was coerced into doing so, the court found it impossible to see how "his right to a determination of individual guilt" was in any way impaired by the offer (*id.* at 13). The court therefore declined to countenance what "amounts to a request for a declaratory judgment that all package-deal plea bargains are illegal" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 12-23) that the court of appeals erred in upholding the disqualification of his counsel of choice, in spite of a representation by all three co-defendants that they would waive any potential or actual conflicts of interest arising out of counsel's joint representation.

In *United States* v. *Flanagan,* 679 F.2d 1072, 1076 (3d Cir. 1982), rev'd on other grounds, 465 U.S. 259 (1984), the Third Circuit held that a trial court may override the preference of multiple defendants for representation by a single lawyer, despite a knowing waiver of conflicts by all defendants, where it is "very likely" that an actual conflict of interest will develop. We acquiesced in the petition for a writ of certiorari in that case because of a conflict between the decision of the Third Circuit and decisions of the Second and Fifth Circuits holding that co-defendants have a constitutional right to be jointly represented by counsel, despite any conflicts of interest that may arise.

In its opinion in *Flanagan,* this Court did not reach the merits of the joint representation question. Instead, the Court held that an order disqualifying counsel could not be appealed before trial. As a consequence, the conflict among the circuits on the merits of the joint representation

issue was not resolved. In light of more recent developments, however, we believe that the conflict among the circuits on this issue is not as sharp as it appeared to be at the time of *Flanagan.* In any event, we submit that the unusual features of this case render it an unsuitable vehicle for review of the joint representation question.

At the time of *Flanagan,* it appeared that the Second and Fifth Circuits had endorsed a rule flatly forbidding a district court from disqualifying counsel from joint representation if the defendants were all willing to waive their right to conflict-free counsel. See *United States* v. *Curcio,* 680 F.2d 881, 885-888 & n.3 (2d Cir. 1982); *United States* v. *Garcia,* 517 F.2d 272 (5th Cir. 1975). Subsequent decisions from the Second Circuit, the Fifth Circuit, and the Eleventh Circuit suggest that the principles of *Garcia* and *Curcio* are not as inflexible as they may have seemed, and that in making a disqualification decision, a district court may weigh not only the defendant's interest in representation by counsel of his choice, but other interests as well, including the interest of the government as a party to the lawsuit and the interest of the public in the proper administration of justice.

In a recent decision the en banc Second Circuit stated that "[w]hile involuntary disqualification of counsel may prevent an accused from retaining counsel of his choice, courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's constitutional right" (*In re Grand Jury Subpoena Served Upon Doe,* 781 F.2d 238, 250-251, cert. denied, 475 U.S. 1108 (1986)); see also *United States* v. *James,* 708 F.2d 40, 45 (2d Cir. 1983) (disqualification inquiry requires weighing competing interests "of the government, the witness, and the public" against the defendant's desire to be represented by a particular counsel).

The Fifth Circuit has endorsed a similar balancing test, seemingly rejecting the view that a court has no authority to disqualify counsel if the defendant or defendants have waived their right to conflict-free counsel. See *United States* v. *Snyder,* 707 F.2d 139, 143 (1983); *United States* v. *Salinas,* 618 F.2d 1092, 1093, cert. denied, 449 U.S. 961 (1980). Although those cases involved attorneys who were either the target of a related criminal investigation or an indicted co-conspirator, the court in both cases noted that the right of a defendant in a criminal case to retain an attorney of his choice "does not outweigh the countervailing public interest in the fair and orderly administration of justice" (*Salinas,* 618 F.2d at 1093; *Snyder,* 707 F.2d at 143). In particular, the court in *Snyder* agreed with the district court in that case that in spite of the decision in *Garcia,* the defendant's waiver of his right to conflict-free counsel "will not eliminate [the district] court's responsibility to balance the right to one's own counsel with the court's interest in preserving the integrity and the fair administration of justice" (*Snyder,* 707 F.2d at 143).

The Eleventh Circuit, which follows the former Fifth Circuit's decision in *Garcia,* also has not read *Garcia* as establishing a per se ruling requiring a district court to accept potentially conflict-plagued representation any time it is accompanied by the affected parties' waivers of the right to conflict-free counsel. See *In re Paradyne Corp.,* 803 F.2d 604, 611 n.16 (1986) ("The right to counsel of one's choice is not absolute. The right does not override the broader societal interests in the effective administration of justice * * * or in the maintenance of 'public confidence in the integrity of our legal system.' "); *United States* v. *Padilla-Martinez,* 762 F.2d 942, 946, cert. denied, 474 U.S. 952 (1985); *United States* v. *Hobson,* 672 F.2d 825, 828, cert. denied, 459 U.S. 906 (1982) (counsel may be disqualified despite waiver where "necessary to further some overriding social or ethical interest").

Other circuits, including the Ninth Circuit, have adopted a generally similar approach. Those courts have emphasized the importance of the defendant's right to counsel of his choice, while preserving in the district courts the discretion to disqualify counsel in compelling circumstances, even in the face of a waiver. See *United States* v. *Washington,* 797 F.2d 1461, 1465 (9th Cir. 1986); *United States* v. *O'Malley,* 786 F.2d 786, 792 (7th Cir. 1986); *United States* v. *Reese,* 699 F.2d 803, 805 (6th Cir. 1983); *United States* v. *Agosto,* 675 F.2d 965, 972 (8th Cir.), cert. denied, 459 U.S. 834 (1982).

As was evidenced in *Flanagan,* the Third Circuit has permitted district courts broader leeway than other circuits to override defendants' waivers of their right to conflict-free counsel. See also *United States* v. *Provenzano,* 620 F.2d 985, 1004-1005, cert. denied, 449 U.S. 899 (1980); *United States* v. *Dolan,* 570 F.2d 1177, 1183 (1978). But the Ninth Circuit in this case did not adopt the Third Circuit's liberal standard on disqualification. This case therefore does not squarely present the conflict between the Third Circuit's liberal view of disqualification in joint representation cases and the position of courts that have rejected that view. Moreover, because of several unusual features of this case, it is not clear that this case would have been resolved differently in any other circuit.

First, petitioner's interest in being represented by Iredale was entitled to less weight in the circumstances of this case than it might be accorded in other settings. Petitioner did not express an interest in having Iredale as his attorney until after Bravo pleaded guilty, which occurred shortly before trial. At that time petitioner was already represented by the attorney of his choice, and he gave no indication that he was dissatisfied with that attorney's performance. As petitioner's attorney explained to the district court, petitioner was not complaining about his retained

counsel's performance, he simply wished to add Iredale to "his defense team" (Tr. 52).

Second, as the court of appeals noted (Pet. App. 9), the substitution request was not made until shortly before the trial. All courts recognize that a district court has discretion to refuse to accept a substitution of counsel, in spite of a waiver from the defendant, when the request for substitution is made at the eleventh hour. See *United States* v. *Mastroianni,* 749 F.2d 900, 913-914 (1st Cir. 1984); *United States* v. *Silva,* 611 F.2d 78, 79 (5th Cir. 1980). In this case, the hearing on the motion had to be held on an expedited basis the day before trial, and in light of the short time period allotted to resolve the matter, it is open to question whether valid waivers could have been obtained from all three defendants. In order to obtain waivers that would be secure from later challenge, for example, it might have been necessary to ensure that both Bravo and Gomez-Barajas had separate representation for purposes of the substitution hearing, and it would have been necessary for the court to conduct a detailed inquiry in person, rather than simply accepting Iredale's representation that they were willing to waive any objection to his representation of petitioner. The shortness of time before trial made such procedures impractical, if not impossible.

Third, the circumstances of the substitution motion in this case raised a particularly serious risk of undermining public confidence in the integrity of the legal system. Petitioner moved to have attorney Iredale represent him immediately after one of the co-defendants represented by Iredale pleaded guilty, and at a time when it appeared likely that that co-defendant might testify for the government. The public could well view that arrangement with concern for two reasons. On the one hand, petitioner could be perceived as trying to influence the witness's testimony (*e.g.*, to keep him from turning on petitioner at trial) by hiring that witness's attorney as his own. Alternatively, the

selection of Bravo's attorney could be viewed as an effort on petitioner's part to obtain the advantage of confidential information revealed by Bravo to his attorney before Bravo testified against petitioner. The risk of such adverse perception was increased in this case by the fact that Iredale represented not only Bravo, but Gomez-Barajas as well. The public could conclude that by retaining Iredale, petitioner was seeking to ensure that Gomez-Barajas, petitioner's alleged marijuana supplier, would not become a government witness and testify against petitioner at trial. Thus, quite apart from the adverse effects of the potential conflict of interest on the three defendants represented by Iredale, the negative impact of Iredale's representation on the public perception of the fairness of the proceedings was sufficient to justify the district court's action in this case.

In sum, we acknowledge that there is a difference in approach among the circuits on this issue. And we agree that that difference might call for review by this Court in an appropriate case. But because this case arose from a circuit that gives district courts only limited authority to disqualify defense counsel over a defendant's waiver, and because the unusual facts of this case make a particularly compelling case for disqualification, review by this Court in this case is not warranted.[4]

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[4] Petitioner suggests (Pet. 18, 22-23) that the court of appeals improperly adopted an "abuse of discretion" standard in reviewing the district court's order denying substitution of counsel. The court's opinion makes clear that it was referring to the district court's sphere of discretion on this issue and was not suggesting that an order disqualifying defense counsel would almost invariably be upheld. Rather, the term was used to indicate that, even where the affected parties have waived their right to conflict-free counsel, a district court retains some authority to disqualify counsel, if the court determines in its discretion that the multiple representations should not be permitted. In that sense, the reference to "abuse of discretion" is simply another way of stating that the defendant's Sixth Amendment right does not totally foreclose a district court from ordering disqualification in such cases.

2. Petitioner further argues (Pet. 23-28) that his absence from an ex parte conference between his lawyer and the trial judge several months before trial violated Fed. R. Crim. P. 43(a) and resulted in a conflict of interest that should have been disclosed to petitioner. Neither of these contentions merits review.

Rule 43(a) provides that "[t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule." As the court of appeals correctly noted (Pet. App. 11), the district court's ex parte conference with petitioner's counsel did not fit into any of these categories, and petitioner's presence at the conference was not required.

The better practice would have been to advise petitioner of the conference, but petitioner suffered no prejudice from the trial judge's failure to do so. Petitioner admitted that he already knew of his attorney's past substance abuse, knew that he was a member of Alcoholics Anonymous, and knew that he might also have been a member of Narcotics Anonymous (R. 107-108).[5] The court of appeals properly rejected as "merely speculat[ive]" petitioner's assertion that his counsel might have been intimidated by the trial court (Pet. App. 12). Petitioner, as the court noted, "has alleged no facts indicating prejudice from an intimidated, less-than-diligent defense" (*ibid.*). Thus, even if the trial court did err in not informing petitioner of the conference, the error was harmless, as the court of appeals concluded (*ibid.*). In any event, the fact-bound question of whether the error was harmless in the circumstances of this case does not warrant review, especially in light of the court of appeals' admonition that if a similar situation should arise in the future, it should be handled differently (see page 5, *supra*).

[5] "R." refers to the record on appeal in the court of appeals.

3. Finally, petitioner claims (Pet. 28-31) that the "package deal" plea bargain offered to petitioner and his co-defendant was impermissible. Petitioner's complaint appears to be that because his co-defendant rejected the plea offer, he was prevented from striking an advantageous bargain with the government.[6] It is axiomatic, however, that a "there is no constitutional right to plea bargain." *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). As the court below recognized (Pet. App. 14), since petitioner was not coerced into pleading guilty his right to an individual determination of guilt was not infringed. And since he had no right to a plea bargain, he has no grounds for complaint that the offer he would have liked to accept was never made to him individually.

Because petitioner has suffered no deprivation of his rights, the general propriety of "package deal" plea bargains is not presented in this case. Only a defendant who complained that he had been compelled to plead guilty because of the pressure from co-defendants who were parties to the "package deal" could complain about the "package deal" offer. In any event, the desire to conserve judicial and prosecutorial resources by avoiding a trial altogether, which is the motive force behind such an offer, is perfectly legitimate, and the trial court can ensure the voluntariness of any resulting pleas by a careful adherence to the requirements of Rule 11(d).

[6] Petitioner does not suggest what relief he seeks, but presumably he would like to have his conviction vacated and the prosecutor ordered to offer petitioner individually the same plea bargain that was offered only as part of the package deal.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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REPLY BRIEF

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No. 87-4

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MARK ERICK WHEAT, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 8[illegible]-4

MARK ERICK WHEAT, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

STATEMENT OF THE CASE

The conviction of the petitioner primarily turned on the credibility of Victor Vidal, the marijuana overlord who became the Government's principal witness. Vidal obtained large quantities of marijuana, a total of more than 20 tons from several wholesalers in Mexico,[1] and stored it on

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[1] Over a five-year period Vidal delivered 20 tons. He had received five tons each from Verdugo, Solis, and Galindo, and 1000 pounds from Silva (2 RT

consignment in the petitioner's garage. Vidal inventoried the property kept on the petitioner's premises, and when it was sold the proceeds were turned over to Vidal. (RT 1 RT 201-202.) The credibility of Vidal, who received substantial benefits for his cooperation[2], was the principal issue for the jury.

Vidal was the principal witness against Gomez-Barajaz in a prior jury trial on overlapping marijuana charges, but because

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272-4, 295-303).

[2] The Government's chief witnesses, Victor Vidal and Manuel Antuna, had been heavily rewarded for their cooperation with the Government. They were released on bail on federal charges and each expected no further incarceration (1 RT 111, 2 RT 264; 4 RT 619, 683). Charges had been dismissed against their spouses (2 RT 265-6). They and their families would be given resident alien status (2 RT 262; 4 RT 679). Access to the witness protection program would be provided (1 RT 111; 4 RT 680). Each had been paid over $10,000 during their cooperation, and Vidal was allowed to keep some of the property previously forfeited (2 RT 263, 268; 4 RT 619). Vidal had not reported about $250,000 income during the last three years. He hoped that he would not be charged or assessed taxes.

of Attorney Iredale's successful cross-examination of Vidal, the jury acquitted Gomez-Barajas (Pet. App. 5). Gomez-Barajas did plead guilty to additional charges of tax evasion and illegal importation of merchandise. At the time of petitioner's trial, Gomez-Barajas had negotiated a disposition to receive a one-year custodial sentence on these charges[3].

At the time his client Bravo entered a plea of guilty[4] and five days before petitioner's jury trial was scheduled, Attorney Iredale advised the court and prosecutor that he would be representing petitioner. The court specifically inquired

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[3] On 15 November 1985 Gomez-Barajas received the agreed upon sentence of 450 days in custody (one year when credits are deducted). United States v. Gomez-Bernal et al., So. Dist. Calif. Crim. No. 84-100, CR 229. Judicial notice is requested. Fed. R. Evid. 201(f).

[4] Bravo's trial had been set together with petitioner's (CR 61), and plea negotiations called for a probationary sentence with no more than 30 days in custody under the Youth Corrections Act.

of Bravo if he an objection to Iredale's representing the petitioner, but Bravo had none (1 RT 16). The prosecutor noted that "[t]he government has not specifically made any plans to call him (Bravo) as witness but that is, of course, always a potential." (1 RT 12-13.)

The trial court accepted an offer of proof that if the petitioner, Bravo, or Gomez-Barajas were called to testify they would indicate that they believed there was no conflict, they had discussed this matter with their counsel, and if there were actual or potential conflicts they would be more than willing to waive them (1 RT 43).

Gomez-Barajas was not called as a witness, and Bravo, who was called by the Government testified as to a delivery of marijuana from Los Angeles to a house in Bonita, California. The prosecutor stated "that he (Bravo) had no direct testimony

identifying either of these two defendants (petitioner and his co-defendant at trial)." (4 RT 731.) Neither counsel for petitioner nor counsel for the co-defendant cross-examined Bravo (4 RT 735, 737). Near the end of trial defense counsel contended that Bravo "was called by creating a conflict or attempting to create one where there was none...." (5 RT 754-755).

Trial defense counsel had supported the petitioner's request for Attorney Iredale. When the court disqualified Iredale who had been retained by petitioner, trial defense counsel was unprepared to proceed, and the court granted a day and a half continuance. Attorney Iredale had been prepared to go forward with the trial as scheduled (1 RT 32). At the start of the trial defense counsel again requested that Iredale substitute for him or serve as co-counsel. Both requests were denied. (1 RT 53.1, 54).

During the cross-examination of Vidal defense counsel requested that Iredale be permitted to cross-examine, but this request was denied (2 RT 230-231). Trial defense counsel again requested that Iredale be substituted to cross-examine Antuna because no conflict had appeared, and this request was denied (4 RT 647).

REASONS FOR ALLOWANCE OF THE WRIT

A. GOVERNMENT-SOUGHT DISQUALIFICATION OF DEFENSE COUNSEL IN A CRIMINAL CASE AFTER ALL POTENTIAL CONFLICTS ARE WAIVED VIOLATES THE SIXTH AMENDMENT RIGHT TO COUNSEL AND CONFLICTS WITH THE PRECEDENT OF THIS COURT.

The Government did not respond to the precedents of this Court acknowledging the right to counsel of one's choice. The Government did concede that when the issue of disqualification of counsel of one's choice because of joint representation was before this court (**Flanagan v. United States**, 465 U.S. 259 (1984)), it acquiesced in the petition for certiorari when the

issue was framed as the right of the common defense. Petitioner was legally more entitled than **Flanagan** to the services of Attorney Iredale, who had already reached a disposition as to his two other clients, Gomez-Barajas and Bravo, and would not have been required to represent the interests of all three in a joint trial.

In **Holloway v. Arkansas**, 435 U.S. 475 (1978), this Court reversed when the defendants did not consent to representation by a single public defender. This Court was careful to note the advantages of joint representation:

> One principle applicable here emerges from **Glasser** [**v. United States**, 315 U.S. 60 (1942)] without ambiguity. Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney, indeed, in some cases, certain advantages might accrue from

> joint representation. In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack." 435 U.S. at 482-83.

The Government fails to mention **Cuyler v. Sullivan**, 446 U.S. 335, 355 (1980)(See Pet. 14-15), which held that retained counsel for multiple defendants could not be considered ineffective or subject to disqualification for potential conflict, but only for "actual conflict." After trial a criminal defendant must show actual conflict to obtain relief, but pretrial a prosecutor need only show a vague potential conflict to disqualify a defendant's chosen counsel. **Cuyler**, like **Holloway**, recognized the defendant's advantage in multiple representation, and this Court must establish some standard higher than potential conflict to be consistent with **Cuyler**.

Iredale's successful cross-examination of Vidal was sought by the petitioner, but

the Government feared a proven experienced trial advocate in a repeat jury trial when Vidal would again be the cornerstone of the prosecution. Gomez-Barajas, by the acquittal, had the protection of former jeopardy on the overlapping case, and on the additional charges had already pleaded guilty with an agreed disposition. Bravo added nothing to the Government's case but to provide the prosecutor an excuse to avoid facing a "super-star" courtroom advocate. The depth of the unfairness of this prosecutorial tactic is manifest.

When Attorney Iredale represented both Gomez-Barajas and Bravo, the Government offered no objection to his entering a plea of guilty on behalf of Bravo. When Attorney Iredale was ready for trial for the petitioner, then the Government asserted the conflict.

This important Sixth Amendment issue

left unresolved in **Flanagan** should be reviewed to clarify this Court's precedent on this issue and the substantial conflicts among the circuits.

B. THE NINTH CIRCUIT'S ADOPTION OF OPEN-ENDED DISCRETION TO DISQUALIFY DEFENSE COUNSEL IN A CRIMINAL CASE CONFLICTS WITH THE MAJORITY OF OTHER CIRCUITS.

The Government acknowledges the conflict among the circuits (BIO 6-7, 11) and suggests review might be appropriate in a different case (BIO 11). The candid concession of "certworthiness" as to the issue is enhanced by the court of appeal's broad language permitting disqualification in the absence of an inquiry or a hearing and despite waivers of all affected clients.

The district court conducted no inquiry or hearing on the appropriateness of the waivers by petitioner and the two co-defendants whose cases were for all practical purposes terminated. Because the

defense counsel who asked that Attorney Iredale be substituted or permitted as co-counsel was unable to go forward with the trial, the judge gave him an extra day and a half to prepare or negotiate for a plea. In less than an hour the district court could have made a determination as to the nature and extent of the conflict.

The district court on such an important Sixth Amendment issue, unlike the procedure established in other circuits, refused to make any inquiry as the nature of the conflict. Both **United States v. Garcia**, 517 F.2d 272, 277 (5th Cir. 1975), and **In re Paradyne**, 803 F.2d 604 (11 Cir. 1983), require a detailed inquiry as to the nature of the conflict. The Second and Seventh circuits would also require a fair inquiry before disqualification (Pet. 19-20). The district court -- which itself would not have required disqualification of Iredale-

- adopted the challenge and speculations of the prosecutor. The fundamental constitutional right should not have been so easily abrogated by the suggestions of an interested combatant fearful of so formidable an opponent.

The Government makes no reference to alternatives or limitations that might have been placed on Iredale so as to effectively represent the petitioner and avoid even potential conflicts. What the district court did here was disqualification of counsel under the "irrefutable presumption doctrine" criticized and rejected in **United States v. Agosto**, 675 F.2d 965, 971-972 (8th Cir. 1982).

The Government relies on cases with no factual comparability to petitioner's situation. The Government cited **In re Grand Jury Subpoena Served Upon Doe**, 781 F.2d 238 (2d Cir. 1986)(en banc)(BIO 7), but the

defendant was challenging a grand jury subpoena of records from his attorney -- a conflict between the attorney and the client[5]. In **United States v. James**, 708 F.2d 40 (2d Cir. 1983) (BIO 7) the Government witness who had been previously represented by the defendant's attorney objected to the attorney's representation and the court permitted disqualification. These cases are readily distinguishable. Here, the Government sought no information from Attorney Iredale, and Bravo, the Government's unnecessary witness, waived any conflict.

The Government contends "the Ninth Circuit in this case did not adopt the Third Circuit's liberal standard ("very likely" but not "highly speculative"

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[5] The court required an in limine disqualification hearing by the trial judge "who must weigh the probative value of the information the government seeks [before the grand jury] against the loss of counsel of the accused's choice." 781 F.2d 238, 250.

conflict) on disqualification (Flanagan)." (BIO 9). The Ninth Circuit expressly adopted the Third Circuit standard and was more liberal by leaving open disqualification even with a "highly speculative" conflict.[6]

Contrary to the Government's assertion (BIO), other circuits did not, then or now, prohibit disqualification but required district courts to proceed carefully, after inquiry, and exploring alternatives to avoid the impairment of the Sixth Amendment right to choice of counsel. The Ninth Circuit, with the lowest standard of potential conflict ("very likely" or something less), places the matter solely with the discretion of the trial judge, and establishes the lowest level of appellate scrutiny -- "abuse of discretion." The Ninth Circuit opinion is a "green light" for disqualification. If defense counsel is disqualified in a criminal case, that decision will not be set aside because the test for conflict and the standard of appellate scrutiny are so low. Under such standard the Sixth Amendment right to counsel of choice evaporates.

The Government gives three reasons that although a "certworthy issue," this case should not be accepted for review. (BIO 9-11). In fact, those three reasons: nature and need for counsel, timeliness, and public confidence, support the grant of review.

Defense counsel repeatedly asked for Iredale, and if the court would not permit him as sole counsel, then defense counsel asked that he serve as co-counsel or be

---

[6] The court below stated: "We need not decide here whether the potential for an actual conflict must be 'very likely,' rather than 'highly speculative.' **Flanagan**, 679 F.2d at 1076." (Pet. App. 11.) **Flanagan** had stated: "That choice should not be interfered with in cases where potential conflicts of interest are highly speculative." 679 F.2d at 1076.

allowed to question certain witnesses. Three months earlier the trial judge (in a secret meeting with defense counsel) accused him of current drug usage, but this conflict of interest, the attorney's concern about himself, was never disclosed when the petitioner wanted and needed Attorney Iredale. The court should have been more sensitive to the request of compromised defense counsel to be replaced.

The request for Iredale was made when he was ethically available -- after he had arranged favorable dispositions for his other two clients. Attorney Iredale requested no time to prepare, and there would be no delay. In fact, Iredale would have gone to trial sooner than trial defense counsel, who received additional time because he was not prepared to go

forward as scheduled.[7]

Public confidence will not be enhanced by a prosecutor using the judicial system-- under the guise of protecting a defendant's rights -- to deny him the counsel of his choice in a criminal case. The prosecutor had been previously bested in a jury trial involving the same principal witness, and now the defense lawyer who bested him is removed at the prosecutor's request. The speculative basis of the prosecutor's request, adopted by the court, demonstrates no real conflict, but a conveniently imagined one. Fair play in a democratic society should allow a criminal defendant to obtain the best advocate he can retain. In this case, the defense lawyer Iredale

---

[7] Although Iredale was hired for the trial, we will never know what plea bargaining might have taken place if the petitioner was able to keep him as his attorney. Iredale who obtained an acquittal in the related case involving the same witnesses would have been able to more effectively bargain for petitioner.

was disqualified because he was "too good."

C. THE EX PARTE PRETRIAL CONFERENCE WITH DEFENSE COUNSEL SERIOUSLY ERODED HIS INDEPENDENCE AND ADVOCACY BY THE COURT'S ACCUSATION OF CURRENT DRUG USE AND CREATED A CONFLICT OF INTEREST WHICH SHOULD HAVE BEEN DISCLOSED TO THE PETITIONER.

The Government repeats the mistake of the Court of Appeals by treating the secret hearing as a discussion of past substance abuse or alcoholism.(Pet. App 11; BIO 12.) The trial judge conducted the hearing because he had received reports of current drug usage, a state and federal criminal offense. The judge felt compelled to make inquiry as to defense counsel's present ability to defend the case (23 May 85 RT 3). The defense counsel expressly requested that the inquiry not be brought to the attention of his client (23 May 85 RT 4, 11), but he did expect "follow-up" by the court (23 May 85 RT 10). Defense counsel's denial ("I don't use these drugs any more"

(23 May 85 RT 3) did not dissipate the cloud of the accusation.

Defense counsel was concerned about the impact on himself, for the information furnished to the judge could be referred to the federal prosecutor or a state prosecutor for further investigation or prosecution. The potential for prosecution as well as a transcript should have been furnished to the petitioner before trial. If the petitioner had the transcript, his request for Iredale would have been further substantiated, or if not Iredale, he could have obtained other defense counsel unimpaired by the possibility of a criminal investigation for current drug use.

D. THE PACKAGE DEAL CONDITIONING PETITIONER'S PLEA BARGAIN UPON THE CO-DEFENDANT PLEADING GUILTY TRANSGRESSED LEGITIMATE PROSECUTORIAL BARGAINING.

Petitioner asserts the right to fairness ("due process") in federal plea bargaining.

Conditioning his plea bargain on his ability to influence a co-defendant to plead guilty is unreasonable and should not be permitted in the federal courts. Under the plea agreement without the unreasonable condition, the petitioner would have received a five-year maximum sentence, but after trial is subject to a ten-year sentence.

CONCLUSION

For the reasons in the Petition and this Reply, a writ of certiorari should be granted.

Respectfully submitted,

John J. Cleary
Attorney for Petitioner

DATED: 21 September 1987

JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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Mark Erick Wheat

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RELEVANT DOCKET ENTRIES: PETITIONER

U.S. v. Mark Erick Wheat CR 84-1099

12/11/84	1	Filed indictment (Dkt'd 12/13/84).
		* * *
12/19/84	32	Defendant's first appearance (surrendered.) (MAG McKEE) (Dkt'd 01/07/85).
	32	Appearance of attorney SEMCO, DAVID I (MAG McKEE) (Dkt'd 01/07/85).
		* * *
	32	Defendant enters plea of not guilty (Counts 1,5,14) (MAG McKEE) (Dkt'd 01/07/85).
		* * *
04/24/85	168	Dismissed on government's motion (Counts 1,5,14) (JUDGE IRVING) (Dkt'd 05/01/85).
		* * *
	173	Filed judgment of discharge (Counts 1,5,14) (Entered 5/1/85.) (JUDGE IRVING) (Dkt'd 05/01/85).

U.S. v. Mark Erick Wheat CR 85-307

04/10/85	1	Filed indictment (Dkt'd 04/11/85).
		* * *
04/11/85	3	Appearance of Attorney SEMCO, DAVID I (JUDGE IRVING) (Dkt'd 04/12/85).
		* * *
04/12/85	7	Defendant's first appearance (JUDGE IRVING) (Dkt'd 04/15/85).

	7	Arraignment held (Counts 1, 6-10, 12) (JUDGE IRVING) (Dkt'd 04/15/85).
	7	Defendant enters plea of not guilty (Counts 1,6-10,12) (JUDGE IRVING) (Dkt'd 04/15/85).
		* * *
06/05/85	48	Filed superceding indictment (Dkt'd 06/13/85).
		* * *
06/10/85	53	Arraignment held (Counts S1, S6-S12) (JUDGE IRVING) (Dkt'd 06/24/85).
	53	Defendant enters plea of not guilty (Counts S1, S6-S12) (JUDGE IRVING) (Dkt'd 06/24/85).
		* * *
07/23/85	64	Filed memorandum opinion (t/w Order denying motions to dismiss for violation of MASSIAH, interference with the attorney-client privilege and government misconduct before the Grand Jury. Entered 8/8/85.) (JUDGE IRVING) (Dkt'd 08/08/85.
		* * *
08/26/85	69	Motion made in open court to withdraw as attorney (MOT#60) (dft request for substitution of counsel, Eugene Iredale in place of David Semco.) (JUDGE IRVING) (Dkt'd 08/27/85).
	70	- (MOT#60) (Govt's oppos to dft's motion for substitution of counsel) (JUDGE IRVING) (Dkt'd 08/27/85).

	69	Motion to withdraw as attorney denied (MOT#60) (motion for substitution of counsel - Denied.) (JUDGE IRVING) (Dkt'd 08/27/85).
	69	Trial date set for 08/28/85 @ 2:00 PM (Counts 1,6-10, 12, S1, S6-S12)(JUDGE IRVING) (Dkt'd 08/27/85).
08/27/85	74	Filed trial memorandum (Counts 1,6-10,12,S1,S6-S12) (JUDGE IRVING) (Dkt'd 08/28/85).
		* * *
08/28/85		Voir dire begins-jury (Counts 1,6-10,12,S1,S6-S12) (JUDGE IRVING) (Dkt'd 08/30/85).
		Jury impaneled (Counts 1, 6-10,12,S1,S6-S12) (JUDGE IRVING) (Dkt'd 08/30/85).
		Trial begins-jury (Counts 1, 6-10,12,S1,S6-S12) (1st Day Jury Trial) (JUDGE IRVING) (Dkt'd 08/30/85).
		Jury trial continued to 08/30/85 @ 8:45 AM (JUDGE IRVING) (Dkt'd 08/30/85.
08/30/85		Trial held-jury (Counts 1, 6-10,12,S1,S6-S12) (2nd day - Swore witnesses. Alternate jurors impaneled and sworn.) (JUDGE IRVING) (Dkt'd 09/03/85).
		Motion made in open court for mistrial (MOT#61) (Counts 1,6-10,12,S1,S6-S12) (& to strike) (Dkt'd 09/03/85).
		Motion for mistrial denied (MOT#61) (& to strike) (JUDGE IRVING) (Dkt'd

09/03/85).
Jury trial continued to 09/04/85 @ 9:00 AM (JUDGE IRVING) (Dkt'd 09/03/85).

09/04/85 Trial held-jury (Counts 1, 6-10,12,S1,S6-S12) (3rd day - Swore witnesses and filed exhibits) (JUDGE IRVING) (Dkt'd 09/05/85).
Jury trial continued to 09/05/85 @ 9:15 AM (JUDGE IRVING) (Dkt'd 09/05/85).

09/05/85 Trial held-jury (Counts 1, 6-10,12,S1,S6-S12) (Prior to trial, motion re handwriting exemplar of deft Mark Wheat - Granted. Jury Trial - 4th day - Swore witnesses and filed exhibits.) (JUDGE IRVING)(Dkt'd 09/06/85).
Jury trial continued to 09/06/85 @ 8:45 AM (JUDGE IRVING) (Dkt'd 09/06/85).

09/06/85 Trial held-jury (Counts 1,6-10,12,S1,S6-S12) (5th day-Swore witnesses and filed exhibits (JUDGE IRVING) (Dkt'd 09/09/85).
Motion made in open court for mistrial (MOT#63) (Counts 1,6-10,12,S1,S6-S12) (JUDGE IRVING) (Dkt'd 09/09/85).
Motion for mistrial denied (MOT#63) (JUDGE IRVING) (Dkt'd 09/09/85).
Jury trial continued to 09/10/85 @ 9:15 AM (JUDGE IRVING) (Dkt'd 09/09/85).

* * *

09/10/85 Trial held-jury (Counts 1,6-10,12,S1,S6-S12) (6th day-

Swore witnesses and filed exhibits.) (JUDGE IRVING) (Dkt'd 09/11/85).
Motion made in open court for severance/separate trial (MOT#64) (Counts 1,6-10,12, S1,S6-12) (JUDGE IRVING) (Dkt'd 09/11/85).
Motion for severance/separate trial denied (MOT#64) (JUDGE IRVING) (Dkt'd 09/11/85).
Motion made in open court for mistrial (MOT#65) (Counts 1,6-10,12,S1,S6-S12) (re Agent Dunn's testimony) (Dkt'd 09/11/85).
Motion for mistrial denied (MOT#65) (re Agent Dunn's testimony)(JUDGE IRVING) (Dkt'd 09/11/85).
Jury trial continued to 09/11/85 @ 9:00 AM (JUDGE IRVING) (Dkt'd 09/12/85).

09/11/85 Trial held-jury (Counts 1, 6-10,12,S1,S6-S12) (7th day) (JUDGE IRVING) (Dkt'd 09/12/85).
Jury trial continued to 09/12/85 @ 9:00 AM (JUDGE IRVING) (Dkt'd 09/12/85).

09/12/85 Trial held-jury (Counts 1,6-10,12,S1,S6-S12) (JUDGE IRVING) (Dkt'd 09/16/85).

80 Trial ends-jury (Counts 1,6-10,12,S1,S6-S12) (JUDGE IRVING) (Dkt'd 09/16/85).

81 Jury verdict of guilty (Counts S1,S6-S10) (JUDGE IRVING) (Dkt'd 09/16/85).

81 Jury verdict of not guilty (Counts S11-S12) (Jury

polled.)(JUDGE IRVING) (Dkt'd 09/16/85).

80 Order cause referred to the probation department for a presentence investigation (Counts S1,S6-S10) (JUDGE IRVING) (Dkt'd 09/16/85).

80 Sentencing set for 11/12/85 @ 9:00 AM (Counts S1,S6-S10) (JUDGE IRVING) (Dkt'd 09/16/85).

* * *

11/12/85 92 Sentencing continued to 11/25/85 @ 9:00 AM (Counts S1,S6-S10) (JUDGE IRVING) (Dkt'd 11/14/85).

11/22/85 98 Filed sentencing memorandum (Dkt'd 11/27/85).

* * *

101 Filed affidavit (Declaration of David I. Semco) (Dkt'd 11/27/85).

102 Filed affidavit (of John Cleary) (Dkt'd 11/27/85).

11/25/85 103 Minute sheet filed (Court unseals Ct Reporter's transcripts of 5/23/85 as to counsel only for the parties.) (JUDGE IRVING) (Dkt'd 11/27/85).

* * *

12/02/85 106 Motion for new trial filed (MOT#66) (Counts 1,6-10,12, S1,S6-S10) (Notice of Motion & Motion for New Trial ordered sealed per order filed 12/3/85. The prosecution's response shall also be sealed until further order of the court.) (Dkt'd 12/05/85).

107 Filed affidavit in support of motion for new trial (MOT#66) (of Mark Erick Wheat) (Dkt'd 12/05/85).

106 Motion for new trial hearing set for 12/16/85 @ 9:00 AM (MOT#66) (JUDGE IRVING) (Dkt'd 12/05/85).

12/03/85 108 Order filed (for sealing Notice of & Motion for New Trial. The prosecution's response shall also be sealed until further order of the court.) (JUDGE IRVING) (Dkt'd 12/05/85).

12/16/85 111 Attorney SEMCO, DAVID I deleted from case (JUDGE IRVING) (Dkt'd 12/16/85).

111 Attorney, CLEARY, John JOSEPH added to case (JUDGE IRVING) (Dkt'd 12/16/85).

111 Motion for new trial hearing held (MOT#66) (JUDGE IRVING) (Dkt'd 12/16/85).

111 Motion for new trial denied (MOT#66) (JUDGE IRVING) (Dkt'd 12/16/85).

111 Sentencing of defendant (Count S1) (Impris for 10 yrs under 4205(b)(2). Fine $125,000.00 total fine to be paid. Appeal rights read.) (JUDGE IRVING) (Dkt'd 12/16/85).

111 Sentencing of defendant (Counts S6-S10) (Cts conc but consec to Ct S1 -ISS & prob for 5 yrs. Rmg cts dism.) (JUDGE IRVING) (Dkt'd 12/16/85).

111 Dismissed on government's motion (Counts 1,6-10,12)

		(JUDGE IRVING) (Dkt'd 12/16/85).
	111	Status hearing set for 12/18/85 @ 8:45 AM (re PSI Report.) (JUDGE IRVING) (Dkt'd 12/16/85).
	111	Bail hearing set for 01/06/86 @ 2:00 PM (Appeal bond hrg.) (JUDGE IRVING) (Dkt'd 12/16/85).
	112	Issued judgment and commitment to U.S. Marshal (Counts S1,S6-S10) (Entered 12-16-85 JUDGE IRVING) (Dkt'd 12/ 5).
	112a	Filed notice of appeal (Counts S1,S6-S10) (APPL#2) (re final judgment entered 12/16/85.) (Dkt'd 12/30/85).
		* * *
01/23/86	122	Motion for bail pending appeal granted (MOT#67) (for release pending appeal) (JUDGE IRVING) (Dkt'd 01/29/86).
	122	Order bail pending appeal set in the amount of $320,000.00 (C/S cosignners Mr. Poter and Mrs. Wheat-conditions of bond on appeal 1thrul3 see mintues ord) (JUDGE IRVING) (Dkt'd 01/29/86).
01/24/86	123	Filed personal appearance bond in the amount of $320,000.00 (posted 1/23/86 - t/w advice to deft, corporate resolution, cpy of Trust Deed address as 1237 Primavera, Palm Springs, Ca, Cpy of Grant Deed for the same address and Trust Deed

		address as 12 E. Ross Ave., El Centro, CA + Corporate resolution) (MAG GONZALEZ) (Dkt'd 01/29/86).

RELEVANT DOCKET ENTRIES: RELATED CASES

United States v. Gomez-Barajas CR 84-646

06/28/84	2	Appearance of attorney IREDALE, EUGENE G (Dkt'd 06/29/84).
		* * *
04/24/85	166	Motion to dismiss granted (MOT#63) (Govt's. Dism all counts except Ct 9.) (JUDGE IRVING) (Dkt'd 04/26/85).
		* * *
09/18/85	187	Dismissed on government's motion (Count 9) (JUDGE IRVING) (Dkt'd 09/20/85).

United States v. Gomez-Barajas CR 84-1099

12/14/84	3	Appearance of attorney IREDALE, EUGENE G (JUDGE IRVING) (Dkt'd 12/18/84).
		* * *
08/16/85	208	Filed superseding information (Dkt'd 08/19/85).
		* * *
	209	Defendant enters plea of guilty (Counts 45,S1) (JUDGE IRVING) (Dkt'd 08/19/85).
		* * *
09/18/85	220	Sentencing of defendant (Count S1) (Impris for 5 yrs.) (JUDGE IRVING) (Dkt'd 09/18/85).
	220	Sentencing of defendant (Count 45) (ISS & prob for 5 yrs, supervised, consec to

		Ct S1. Rmg ct dism.) (JUDGE IRVING) (Dkt'd 09/18/85).
		* * *
	220	Motion for judicial recommendation against deportation hearing held (MOT#69) (JUDGE IRVING) (Dkt'd09/18/85).
	220	Motion for judicial recommendation against deportation granted (MOT#69) (JUDGE IRVING) (Dkt'd 09/18/85).
		* * *
	220	Bond exonerated (JUDGE IRVING) (Dkt'd 09/18/85).
	221	Issued judgment and commitment to U.S. Marshal (Counts 45, S1) (Entered 9/18/85) (JUDGE IRVING) (Dkt'd 09/18/85).
11/15/85	229	Sentencing of defendant (Count 45) (Orig sentence on 9/18/85 -ISS & prob for 5 yrs, supervised, consec to Ct S1. Modified on 11/15/85 - ISS & Prob for 1 yr & 1 yr.) (JUDGE IRVING) (Dkt'd 11/18/85).
		* * *
	230	Issued judgment and commitment to U.S. Marshal (Counts 45, S1) (Modified J/C entered 11-18-85.) (JUDGE IRVING) (Dkt'd 11/18/85).

United States v. Bravo CR 85-307

04/11/85	4	Order appointing attorney HOUTS, JOHN WILLIAM to represent defendant (under 18:3006A(f).) (MAG GONZALEZ)

		(Dkt'd 04/12/85).
		* * *
04/24/85	21	Hearing on pre-trial motions continued to 06/07/85 @ 10:00 AM (Counts 1,5,12) (JUDGE IRVING) (Dkt'd 05/01/85).
		* * *
08/22/85	67	Defendant enters plea of guilty (Count S1) (JUDGE IRVING) (Dkt'd 08/26/85).
		* * *
11/05/85	90	Sentencing of defendant (Count S1) (ISS & prob for 5 yrs under 5010(a)) (JUDGE IRVING) (Dkt'd 11/06/85).
	90	Dismissed on government's motion (Counts 1,5,12,S5,S12) (JUDGE IRVING) (Dkt'd 11/06/85).
	90	Bond exonerated (JUDGE IRVING) (Dkt'd 11/06/85).
	91	Issued judgment and commitment to U.S. Marshal (Count S1) (Entered 11-6-85.) (JUDGE IRVING) (Dkt'd 11/06/85).

United States v. Gomez-Barajas CR 85-308

04/11/85	2	Appearance of attorney IREDALE, EUGENE G (JUDGE IRVING) (Dkt'd 04/12/85).
		* * *
07/25/85		Trial held-jury (Counts S1,S3) (2nd day - Swore Witnesses and Filed Exhibits. Court excuses alt juror #1 Laura Goldthwait, #2 is now alt #1 and alt juror #3 is now alt #2.

		Court grants unsealing of DEA 6 report of Victor Vidal for use in the courtroom only and to be resealed at the end of trial.) (JUDGE IRVING) (Dkt'd 08/09/85).
		* * *
		Jury trial continued to 07/26/85 @ 9:30 AM (JUDGE IRVING) (Dkt'd 08/09/85).
07/26/85		Trial held-jury (Counts S1,S3) (3rd day - Swore Witnesses and Filed Exhibits.) (JUDGE IRVING) (Dkt'd 08/09/85).
		Motion made in open court for mistrial (MOT#59) (Counts S1, S3) (JUDGE IRVING) (Dkt'd 08/09/85).
		* * *
		Jury trial continued to 07/30/85 @ 9:00 AM (at 8:45 A.M. for Counsel.) (JUDGE IRVING) (Dkt'd 08/09/85).
		* * *
07/30/85	60	Trial held-jury (Counts S1,S3) (4th day.) (JUDGE IRVING)(Dkt'd 08/09/85).
		* * *
	61	Jury trial continued to 07/31/85 @ 9:00 AM (JUDGE IRVING) (Dkt'd 08/09/85).
07/31/85		Trial held-jury (Counts S1,S3) (5th day - Swore Witnessess and Filed Exhibits.) (JUDGE IRVING((Dkt'd 08/09/85).
		* * *
		Jury trial continued to 08/01/85 @ 9:00 AM (JUDGE

		IRVING) (Dkt'd 08/09/85).
		* * *
08/01/85	62	Trial held-jury (Counts S1,S3) (6th day - Swore Witnesses and Filed Exhibits.) (JUDGE IRVING) (Dkt'd 08/09/85).
		* * *
	63	Jury trial continued to 08/02/85 @ 8:30 AM (JUDGE IRVING) (Dkt'd 08/09/85).
08/02/85	66	Trial held-jury (Counts S1,S3) (7th day - Jury retires for deliberation. Jury Returns with Verdict and Polled. Exhibit V filed.) (JUDGE IRVING) (Dkt'd 08/09/85).
	67	Jury verdict of not guilty (Counts S1,S3) (Filed VERDICT Form.) (Dkt'd 08/09/85).
		* * *
09/18/85	89	Dismissed on government's motion (Counts 1,3,5,6,S5,S6) (JUDGE IRVING) (Dkt'd 09/20/85).

United States v. Gomez-Barajas CR 85-309

		* * *
08/09/85	78	Motion to dismiss granted (MOT#78) (Filed Order dismissing Cts S1, S8, S11 without prejudice. Entered 8/15/85. Cps mld.) (JUDGE IRVING) (Dkt'd 08/15/85).
	78	Dismissed on government's motion (Counts S1,S8,S11)
		* * *
09/18/85	90	Dismissed on government's

		motion (Counts 1, 8, 11, 19, 20, S19, S20) (JUDGE IRVING) (Dkt'd 09/20/85).
	90	Bond exonerated (JUDGE IRVING) (Dkt'd 09/20/85).
09/20/85	91	Filed judgment of discharge (Counts 1, 8, 11, 19, 20, S1, S8, S11, S19, S20) (Entered 9/20/85) (JUDGE IRVING) (Dkt'd 09/20/85).

SUPERCEDING INDICTMENT CR 85-307

[CR 48:1] Filed 5 June 1985

UNITED STATES OF AMERICA,

Plaintiff,

v.

FILEMON MEDINA-MEDINA, aka "El Chombe" (1)
RAUL FERREYRA-SOLIS, aka "Petrocelli" (2)
MARK ERICK WHEAT, aka Mark Chum (3)
MIGUEL ANGEL MEDINA-URIBE (4)
ANGEL BELTRAN (5)
NORMAN GASTELUM (6)
MANUEL CRETIN-SANDOVAL (7)
ANGEL FIGUEREDO (8)
JAVIER BRAVO (9)
RUBEN PRINCE NAVARETTE (10)
JUAN VILLAREAL (11)
FREDERICO SANCHEZ-CRETIN (12)
JON CLINE (13)
JOHN THOMPSON (14)
Defendants.

The grand jury charges:

[CR 48:2] COUNT ONE

Beginning at a date unknown to the grand jury and continuing up to and including January 2, 1985, within the Southern District of California, and elsewhere, defendants FILEMON MEDINA-MEDINA, aka "El Chombe," RAUL FERREYRA-SOLIS, aka "Petrocelli," MARK ERICK WHEAT, aka Mark Chum, MIGUEL ANGEL MEDINA-URIBE, ANGEL BELTRAN, NORMAN GASTELUM, MANUEL CRETIN-SANDOVAL, ANGEL FIGUEREDO, JAVIER BRAVO, RUBEN PRINCE NAVARETTE, JUAN VILLAREAL, FREDERICO SANCHEZ-CRETIN, JON CLINE, and JOHN THOMPSON did knowingly and intentionally combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to knowingly and intentionally commit offenses against the United States, namely, to knowingly and intentionally possess marijuana, a Schedule I Controlled Substance, in a quantity in

excess of 1,000 pounds with intent to distribute; in violation of Title 21, United States Code, Section 841(a)(1), 841(b)(6), and 846.

OVERT ACTS

In pursuance of said conspiracy and to further the objects thereof, the following overt acts, among others, were committed within the Southern District of California, and elsewhere:

1. On or about September 7, 1981, at Jimmy's Restaurant, at Plaza Boulevard and Highway 805, National City, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," hired Victor Vidal to drive cars loaded with marijuana to the residence of defendant MARK ERICK WHEAT, aka Mark Chum, in Escondido, California.

[CR 48:3] 2. On or about September 9, 1981, defendants MANUEL CRETIN-SANDOVAL and RUBEN PRINCE NAVARETTE each drove cars

loaded with 100-150 pounds of marijuana each to the residence of defendant MARK ERICK WHEAT, aka Mark Chum, at 1225 S. Citrus, Escondido, California.

3. On or about September 9, 1981, at 1225 S. Citrus, Escondido, California, defendant MARK ERICK WHEAT, aka Mark Chum, gave RAUL FERREYRA-SOLIS, aka "Petrocelli," approximately $35,000 in payment for a load of approximately 500 pounds of marijuana.

4. On or about September 15, 1981, at the Vagabond Motel, Room 146, 230 Broadway, Chula Vista, California, defendant MIGUEL ANGEL MEDINA-URIBE received approximately $70,000 from Victor Vidal.

5. On or about October 1, 1981, at Rancho San Diego, Spring Valley, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," rented a house for Victor Vidal.

6. On or about November 25, 1981, at

4465 La Cuenta Drive, San Diego, California, defendant JON CLINE received approximately 100 pounds of marijuana from Victor Vidal.

7. On or about March 7, 1982, through August 7, 1982, at 5631 Central Avenue, Bonita, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," received a [CR 48:4] total of approximately $400,000 from Victor Vidal as proceeds from the sale of his marijuana by Victor Vidal.

8. On or about March 6, 1982, at 4465 La Cuenta Drive, San Diego, California, defendant JON CLINE received approximately 100 pounds of marijuana from Victor Vidal.

9. On or about March 15, 1982, at Hyatt Hotel, 6225 West Century Avenue, Los Angeles, California, defendants MANUEL CRETIN-SANDOVAL and RUBEN PRINCE NAVARETTE met with defendant MIGUEL ANGEL MEDINA-URIBE and discussed a marijuana transac-

tion.

10. On or about March 15, 1982, at Hyatt Hotel, 6225 West Century Avenue, Los Angeles, California, defendants RAUL FERREYRA-SOLIS, aka "Petrocelli," MIGUEL ANGEL MEDINA-URIBE, and RUBEN PRINCE NAVARETTE took delivery of a U-Haul truck containing approximately 2,400 pounds of marijuana.

11. On or about March 15, 1982, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," MIGUEL ANGEL MEDINA-URIBE, and RUBEN PRINCE NAVARETTE delivered approximately 2,400 pounds of marijuana to 1370 Greenbay Street, Imperial Beach, California.

12. On or about April 14, 1982, at San Diego, California, defendants RAUL FERREYRA-SOLIS, aka "Petrocelli," and [CR 48:5] MIGUEL ANGEL MEDINA-URIBE traveled south into Mexico to wait until

United States narcotics enforcement efforts died down.

13. On or about June 11, 1982, at the parking lot of the Hyatt Hotel, 6225 West Century Avenue, Los Angeles, California, defendant JAVIER BRAVO picked up and drove a U-Haul truck loaded with approximately 2,400 pounds of marijuana to 5435 Robinwood, Bonita, California.

14. On or about June 11, 1982, at 5435 Robinwood, Bonita, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," MIGUEL ANGEL MEDINA-URIBE, and JAVIER BRAVO unloaded and weighed approximately 2,400 pounds of marijuana.

15. On or about June 19, 1982, at Ramada Inn, "E" Avenue, Chula Vista, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," paid Victor Vidal approximately $1,500 for his participation in the drug distribution organization of

defendant RAUL FERREYRA-SOLIS, aka "Petrocelli."

16. On or about June 30, 1982, at Ramada Inn, "E" Avenue, Chula Vista, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," paid Victor Vidal approximately $1,000 for his participation in the drug distribution organization of defendant RAUL FERREYRA-SOLIS, aka "Petrocelli."

[CR 48:6] 17. On or about December 5, 1982, at 1144 Via Conejo, Escondido, California, defendant FREDERICO SANCHEZ-CRETIN delivered approximately 1,200 pounds of marijuana.

18. On or about December 5, 1982, at 1144 Via Conejo, Escondido, California, defendant MARK ERICK WHEAT, aka Mark Chum, and MANUEL CRETIN-SANDOVAL received a load of approximately 1,200 pounds of marijuana.

19. On or about January 7, 1983,

through March 20, 1983, at 1144 Via Conejo, Escondido, California, defendant MARK ERICK WHEAT, aka Mark Chum, purchased approximately 12,000 pounds of marijuana.

20. On or about March 17, 1983, at Holiday Inn, Montebello, Los Angeles, California, defendant FREDERICO SANCHEZ-CRETIN gave the keys to defendant JOHN THOMPSON for a green Chevrolet van containing approximately 1,200 pounds of marijuana.

21. On or about March 17, 1983, defendant JOHN THOMPSON drove a green Chevrolet van laden with approximately 1,200 pounds of marijuana from Holiday Inn, Montebello, Los Angeles, California, to the residence of defendant MARK ERICK WHEAT, aka Mark Chum, at 1144 Via Conejo, Escondido, California.

22. On or about November 8, 1983, at 1144 Via Conejo, Escondido, California,

defendant MARK ERICK WHEAT, aka Mark Chum, displayed approximately $3,000,000 on the carpet of his office located at his residence.

[CR 48:7] 23. On or about December 2, 1983 and December 3, 1983, defendant ANGEL FIGUEREDO assisted defendant RAUL FERREYRA-SOLIS in purchasing a Cessna 310 airplane for approximately $20,000.

24. On or about December 9, 1983, at 1144 Via Conejo, Escondido, California, defendant MARK ERICK WHEAT, aka Mark Chum, paid Victor Vidal approximately $250,000.

25. On or about December 20, 1983, at 1144 Via Conejo, Escondido, California, defendant MARK ERICK WHEAT, aka Mark Chum, showed Victor Vidal approximately $100,000 in gold coins.

26. On or about December 27, 1983, at 1144 Via Conejo, Escondido, California, defendant MARK ERICK WHEAT, aka Mark Chum,

weighed approximately 2,240 pounds of marijuana.

27. On or about January 14, 1984, at Brown Field Airport in Chula Vista, California, defendant ANGEL FIGUEREDO concealed approximately $60,000 in U.S. currency in an airplane.

28. On or about January 14, 1984 ANGEL FIGUEREDO flew an airplane with approximately $60,000 in U.S. currency from Chula Vista to Culiacan, Sinoloa, Mexico.

29. On or about April 15, 1984, at 1144 Via Conejo, Escondido, California, defendant RAUL FERREYRA-SOLIS, aka "Petrocelli," NORMAN GASTELUM, JOSE REYES-GALINDO, RUBEN PRINCE NAVARETT, JUAN VILLAREAL, and FREDERICO SANCHEZ-CRETIN transported 7,500-8,000 pounds of [CR 48:8] marijuana to defendant MARK ERICK WHEAT, aka Mark Chum.

30. On or about April 15, 1984, at 1144 Via Conejo, Escondido, California, defendant MIGUEL ANGEL MEDINA-URIBE inspected a load of 7,500-8,000 pounds of marijuana.

31. On or about June 15, 1984, at 4709 Morning Canyon Road, Oceanside, California, defendant MARK ERICK WHEAT, aka Mark Chum, loaded approximately 1,300 pounds of marijuana into a vehicle.

[CR 48:9] COUNT TWO

On or about November 25, 1981, within the Southern District of California, defendant JON CLINE did knowingly and intentionally possess with intent to distribute approximately 100 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841 (a)(1).

[CR 48:10] COUNT THREE

On or about March 6, 1982, within the

Southern District of California, defendant JON CLINE did knowingly and intentionally possess with intent to distribute approximately 100 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Section 841(a)(1).

[CR 48:11] COUNT FOUR

On or about March 15, 1982, within the Southern District of California, defendants RAUL FERREYRA-SOLIS, aka "Petrocelli," MIGUEL ANGEL MEDINA-URIBE, and RUBEN PRINCE NAVARETTE did knowingly and intentionally possess with intent to distribute approximately 2,400 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:12] COUNT FIVE

On or about June 10, 1982, within the Southern District of California, defendants

RAUL FERREYRA-SOLIS, aka "Petrocelli," MIGUEL ANGEL MEDINA-URIBE, and JAVIER BRAVO did knowingly and intentionally possess with intent to distribute approximately 2,400 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:13] COUNT SIX

On or about December 5, 1982, within the Southern District of California, defendants MARK ERICK WHEAT, aka Mark Chum, MANUEL CRETIN-SANDOVAL, and FREDERICO SANCHEZ-CRETIN did knowingly and intentionally possess with intent to distribute approximately 1,200 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:14] COUNT SEVEN

On or about and between January 7,

1983, through March 20, 1983, within the Southern District of California, defendant MARK ERICK WHEAT, aka Mark Chum, did knowingly and intentionally possess with intent to distribute approximately 12,000 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:15] COUNT EIGHT

On or about March 17, 1983, within the Southern District of California, defendants MARK ERICK WHEAT, aka Mark Chum, and JOHN THOMPSON did knowingly and intentionally possess with intent to distribute approximately 1,200 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841 (a)(1) and 841(b)(6).

[CR 48:16] COUNT NINE

On or about December 22, 1983, within

the Southern District of California, defendant MARK ERICK WHEAT, aka Mark Chum, did knowingly and intentionally possess with intent to distribute approximately 2,240 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:17] COUNT TEN

On or about April 15, 1984, within the Southern District of California, defendants RAUL FERREYRA-SOLIS, aka "Petrocelli," MARK ERICK WHEAT, aka Mark Chum, MIGUEL ANGEL MEDINA-URIBE, RUBEN PRINCE NAVARETTE, and FREDERICO SANCHEZ-CRETIN did knowingly and intentionally possess with intent to distribute approximately 7,500-8,000 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:18] COUNT ELEVEN

On or about June 15, 1984, within the Southern District of California, defendant MARK ERICK WHEAT, aka Mark Chum, did knowingly and intentionally possess with intent to distribute approximately 1,300 pounds of marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(6).

[CR 48:19] COUNT TWELVE

Beginning at a date unknown to the grand jury and continuing up to and including December 11, 1984, within the Southern District of California, and elsewhere, defendants FILEMON MEDINA-MEDINA, aka "El Chombe," RAUL FERREYRA-SOLIS, aka "Petrocelli," MARK ERICK WHEAT, aka Mark Chum, MIGUEL ANGEL MEDINA-URIBE, ANGEL BELTRAN, NORMAN GASTELUM, MANUEL CRETIN-SANDOVAL, ANGEL FIGUEREDO, JAVIER

BRAVO, RUBEN PRINCE NAVARETTE, JUAN VILLAREAL, FREDERICO SANCHEZ-CRETIN, JON CLINE, and JOHN THOMPSON did knowingly and wilfully combine, conspire, and agree together and with each other and with divers other persons known and unknown to the grand jury to commit offenses against the United States, namely, to knowingly and intentionally import marijuana, a Schedule I Controlled Substance; in violation of Title 21, United States Code, Sections 952, 960, and 963.

OVERT ACTS

In pursuance of the above conspiracy and to further the objects thereof, one or more of the overt acts alleged in Count One, and realleged herein by reference, were committed within the Southern District of California, and elsewhere.

DATED: June 5, 1985.

A TRUE BILL:

Foreperson

PETER K. NUNEZ
United States Attorney

By: MICHAEL E. LASATER
Assistant U.S. Attorney

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR SUBSTITUTION OF COUNSEL

[CR 70:1] Filed 26 August 1985

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARK ERICK WHEAT,

Defendant.

COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Peter K. Nunez, United States Attorney, and Michael E. Lasater, Assistant U.S. Attorney, and hereby files its opposition to the above-referenced motion. This opposition is based upon the files and records of this case, together with the attached background and argument.

DATED: August 26, 1985.

Respectfully submitted,

PETER K. NUNEZ
United States Attorney

MICHAEL E. LASATER
Assistant U.S. Attorney

[CR 70:2] I

BACKGROUND

On December 11, 1984, defendant Wheat, along with numerous other defendants, was charged in a multi-count indictment with various violations involving controlled substances, in case number 84-1099-JLI. Since the return of that indictment, defendant Wheat has been represented by Attorney David Semco.

On April 10, 1985, defendant Wheat was indicted, along with thirteen (13) other defendants, in case number 85-0307-JLI, for violations involving controlled substances. This indictment involves substantially the same activity contained in indictment number 84-1099. As a result, the Government

subsequently dismissed the charges against defendant Wheat in case number 84-1099. Defendant Wheat was again represented by Attorney David Semco.

On August 16, 1985, Juvenal Gomez-Barajas plead guilty to Count Forty-Five (tax count) in case number 84-1099 and a superseding information charging him with illegally importing merchandise. As part of the change of plea involving Juvenal Gomez-Barajas, the Government agreed to recommend the court impose a specific sentence, which would ultimately result in Juvenal Gomez-Barajas serving 365 days in custody. Pursuant to Rule 11(e)(2) the court advised Juvenal Gomez-Barajas it would either follow the Government's recommendation at the time of sentencing or, if it felt such a recommendation was not appropriate after reviewing the presentence report prepared by the Probation Department, the court

would then allow the defendant to withdraw his plea of guilty. Throughout the extended proceedings involving Juvenal [CR 70:3] Gomez-Barajas, which commenced on June 27, 1985, he was represented at all times by Attorney Eugene Iredale.

On August 22, 1985, defendant Javier Bravo entered a plea of guilty to Count One of the indictment in case 85-0307 and admitted the allegations contained in overt acts 13 and 14 involving his transporting of approximately of 2,400 pounds of marijuana from Los Angeles to a residence controlled by Victor Vidal in Bonita. At the conclusion of the proceedings involving the change of plea by defendant Javier Bravo, his attorney, Eugene Iredale, then advised the court that defendant Mark Wheat had retained his services and that he, Iredale, would be substituting in as counsel for Mr. Wheat and would be proceed-

ing to trial in that status on August 27, 1985. Believing there to be a strong conflict of interest in this substitution of counsel, the Government objected. The court then set a hearing for August 26, 1985, to determine the status of counsel for defendant Wheat.

II

ARGUMENT

A. THE COURT SHOULD NOT PERMIT THE REQUESTED SUBSTITUTION OF COUNSEL

The Sixth Amendment's guarantee to a criminal defendant of "counsel for his defense" includes the right to effective assistance of counsel. United States v. Glasser, 315 U.S. 60, 62 (1942). This right to effective assistance of counsel itself includes the right to be represented by an attorney who does not have divided loyalties. United States v. Agosto, 675 F.2d 965 (8th Cir. 1982), cert. denied, 103 S.Ct. 77. In addition to the Sixth Amendment's

[CR 70:4] protection that such assistance of counsel be "untrammeled and unimpaired," United States v. Glasser, supra, various codes of professional conduct protect both the criminal defendant's interest as well as the public's interest in maintaining the adversary system and in assuring that attorneys act ethically.

In fulfilling its responsibility of supervising the members of its bar, the district court should consider such things as the ABA Model Rules of Professional Conduct. See Local Rules for the Southern District of California, Rule 110-5 (1982). See also Cohen v. Hurley, 366 U.S. 119, 123-124 (1961). The ABA Model Rules of Professional Conduct (1983), provide that "a lawyer may represent multiple clients [only] if it is obvious that he can adequately represent the interest of each ..." DR 5-105(c).

Further, it is clear that a defen-

dant's right to counsel of his choice is not a absolute right and must, itself, give way in situations where its indication would create a serious risk of undermining public confidence in our legal system. United States v. Hobson, 672 F.2d 825, 828 (11th Cir.), cert. denied, 103 S.Ct. 208 (1982). See also United States v. Dolan, 570 F.2d 1177, 1181 (3d Cir. 1978).

In this case, the Government believes multi conflicts of interest preclude the request of substitution of counsel. Initially, it is evident that while Juvenal Gomez-Barajas has entered a plea of guilty, the proceedings against him are, by no way, concluded. Rather, the court has specifically told Juvenal Gomez-Barajas that the recommendation by the Government [CR 70:5] is not binding on the court. If the court determines not to follow the Government's recommendation, Juvenal Gomez-Barajas would

then be permitted to withdraw his plea of guilty and proceed to trial on numerous narcotics, firearms and tax charges. Unquestionably, defendant Mark Erick Wheat is a potential witness at those trials. Were he to be called as a witness, counsel for Gomez-Barajas would, of course, be compelled to impeach his credibility. However, that situation would have to prove awkward for counsel if he was, either at that time or previously, counsel for Mark Wheat. In fact, as counsel for Mark Wheat, it would be virtually impossible for him to properly and ethically represent Wheat in determining under what circumstances Wheat might possibly become a witness.

Additionally, Attorney Iredale currently represents defendant Javier Bravo. As the court is well aware, based on the statements made at the change of plea by and on behalf of defendant Javier Bravo,

he was definitely a member of the conspiracy alleged in Count One in case number 85-0307. The Government's continued investigation into this case has revealed that a portion of the marijuana delivered by Bravo to the house controlled by Victor Vidal in June of 1982 was eventually transferred to defendant Mark Wheat. Consequently, the Government is desirous of having Javier Bravo testify at the upcoming trial. Consistent with this desire, the Government has contacted counsel for Javier Bravo and requested that his counsel be made available as a witness. In that regard, the Government has offered to modify its position at the time of sentencing on Javier Bravo in a manner more [CR 70:6] favorable to him, in exchange for his willingness to testify. Because of the very real likelihood that defendant Javier Bravo may be a Government witness at the trial

against defendant Mark Wheat, the existence of a conflict of interest if counsel for Javier Bravo is allowed to represent Mark Wheat becomes clearly apparent and by no means speculative. Consequently, the Government believes the court, in order to ensure the effective assistance of all defendants who have appeared before it during the course of these proceedings and, in order to maintain the public's confidence in the legal profession and to ensure the integrity of the judicial proceedings, the requested substitution of counsel should be denied.

[1 RT 1] REPORTER'S TRANSCRIPT

22 AUGUST 1985 (THURSDAY) 2:30 P.M.

THE CLERK: No. 3-A on calendar, Case No. 85-0307, United States of America v. Javier Bravo, for a disposition.

MR. LASATER: Good afternoon, your Honor. Michael Lasater for the United States.

MR. IREDALE: Gene Iredale, your Honor, for Mr. Javier Bravo, who is present before the court on bond. The problem with our tardiness had to do with the lack of a babysitter.

THE COURT: If it's better you can hold the baby, whatever you want to do.

MR. LASATER: That won't be necessary, your Honor; there is no jury here.

MR. IREDALE: It's a wasted gesture, I'm afraid, for a guilty plea.

THE COURT: Save it for the jury. All right.

MR. IREDALE: Your Honor, we will be entering a plea of guilty to Count One of the Indictment in which Mr. Bravo is named.

THE CLERK: Javier Bravo, do you now withdraw your former plea of not guilty to Count One of the Superceding Indictment

charging you with conspiracy to possess marijuana in excess of 1,000 pounds with intent to distribute?

THE DEFENDANT: Yes Yes, your Honor.

[1 RT 2] THE CLERK: How do you now plead to Count One of the Superceding Indictment; are you guilty or not guilty?

THE DEFENDANT: Plead guilty.

THE CLERK: Counsel, do you waive reading of the indictment?

MR. IREDALE: Yes, ma'am.

(The defendant was sworn.)

EXAMINATION

BY THE COURT:

Q. Mr. Bravo, how old are you?

A. Twenty-five.

Q. How about formal education? How far have you gone in school?

A. I've gone to City College about a year.

Q. Has your attorney advised you and do you fully understand you have the following

constitutional rights: You have the right to a speedy and public trial. Do you understand?

A. Yes, your Honor.

Q. You have the right to be tried by a jury or you can waive your rights to a jury trial and have the judge hear your case sitting without a jury. Do you understand?

A. Yes, your Honor.

Q. You have a privilege against self-incrimination; you don't [1 RT 3] have to testify in your defense if you choose not to. Do you understand?

A. Yes, your Honor.

Q. You have a right to confront and cross examine all the witnesses who accuse you in this matter and you have the right to have witnesses subpoenaed to testify in your own behalf. Do you understand?

A. Yes, your Honor.

Q. You have the right to plead not guilty.

You have the right to persist in that plea. If you enter a plea of guilty this afternoon there will be no trial on the merits of your case. Do you understand?

A. Yes, your Honor.

Q. Do you fully understand you are being charged in Count One of the Superseding Indictment with a conspiracy to possess marijuana in excess of 1,000 pounds with intent to distribute?

A. Yes, your Honor.

Q. What do you understand to be the maximum sentence you can receive?

A. Yes, your Honor. Fifteen years.

Q. And how about a fine? Do you understand you can be fined?

A. Yes, your Honor.

Q. How much?

A. Two hundred and fifty thousand, your Honor.

MR. LASATER: Actually, your Honor, I think

because of [1 RT 4] the date of the incident it's only $125,000.

MR. IREDALE: That is good.

BY THE COURT:

Q. Do you understand the maximum fine that can be imposed on you in this case is $125,000?

A. Yes, your Honor.

Q. Having in mind the sentence you can receive as a result of your plea of guilty, is it your desire to give up your constitutional rights and plead guilty?

A. Yes, your Honor.

Q. Have you had any drugs, medication or alcohol within the last 24 hours?

A. No, your Honor.

Q. Has anyone forced you or threatened you in any way to get you to plead guilty?

A. Uhhm, no.

Q. Are you pleading guilty to the charges contained in Count One of the Superseding

Indictment because you are guilty and for no other reason?

A. Yes, your Honor.

Q. Have there been any plea negotiations, Mr. Iredale?

MR. IREDALE: Yes, your Honor. In return for the plea of guilty to Count One the Government will move to dismiss the two remaining counts in the Indictment against Mr. Bravo at the time of sentencing.

[1 RT 5] At the time of sentencing in this case the Government will not oppose our recommendation to the Court that Mr. Bravo be given probation under the Federal Youth Corrections Act.

The Government reserves the right to recommend a period in custody of up to 30 days as a condition of probation but the Government has agreed that if they do recommend up to 30 days in custody as a condition of probation, they will request

that the Court impose that custody in such a manner that it will not endanger Mr. Bravos' employment; that is, it be given either in a halfway house or on weekends or some other fashion so that he can preserve his employment.

He is employed at the Holiday Inn. He has seven days vacation leave but if he is in custody longer that that his employment would be seriously endangered, and the Government has agreed that if they do recommend some custody of up to 30 days they would ask the Court to impose it in such a fashion that we could preserve his employment.

MR. LASATER: That's correct, your Honor.

BY THE COURT:

Q. Mr. Bravo, you were able to hear your attorney state his understanding of the plea negotiations that have taken place on your behalf. Did you hear that?

A. Yes, your Honor.

Q. Is that consistent with your understanding?

[1 RT 6] A. Yes, your Honor.

THE COURT: Is this a non-binding plea?

MR. IREDALE: It is. The Court is free to impose any sentence that is proper.

BY THE COURT: You understand at the time of your sentencing your attorney Mr. Iredale will make a recommendation to me as to what he feels your sentence should be; Mr. Lasater on behalf of the Government will make a recommendation consistent with what has just been stated for the record; and, in addition, the Probation Department in a written pre-sentence report will also make a recommendation to me as to what they feel your sentence should be.

Q. Do you understand?

A. Yes, your Honor.

Q. You understand, now, that this discus-

sion that has taken place between your attorney and Mr. Lasater about the Government not requesting any more than 30 days in custody is not binding on me. Do you understand that?

A. Yes, your Honor.

Q. At the time you are sentenced if I feel you should go to prison for 15 years I have the authority to send you to prison for 15 years. Do you understand that?

A. Yes, your Honor.

[1 RT 7] Q. And if I decide to impose a sentence on you up to and including a maximum of 15 years in prison, I am not going to allow you to withdraw your plea at the time you are sentenced because you are dissatisfied with the sentence. Do you understand that?

A. Yes, your Honor.

THE COURT: In your opinion, Mr. Iredale, have any of your client's constitutional

rights been violated with respect to the charges contained in Count One of the Superseding Indictment?

MR. IREDALE: One, but that was rectified by your Honor's ruling on the motion to suppress statements; and even given that ruling, I feel it's in his best interests to enter a guilty plea, and there have been no other constitutional rights violated.

THE COURT: And you agree with his pleading guilty?

MR. IREDALE: I do.

THE COURT: As far as you can tell, does he have any meritorious defense factually to the allegations in Count One of the Superseding Indictment?

MR. IREDALE: No, your Honor. Your Honor, also there is one matter that I wanted to inform the Court of.

Mr. Bravo, because he is now 25 and will be 25 at the date of sentencing in

this case is eligible for sentencing under [1 RT 8] the FYCA even though that has now been repealed, because his participation in this conspiracy occurred in 1982, which was during the operative period of the Federal Youth Corrections Act; and we are going to be requesting sentencing under that provision to allow the use of its expungement provisions.

BY THE COURT:

Q. Mr. Bravo, are you aware I am not bound to sentence you under the provisions of the Youth Corrections Act, that is up to me at the time I sentence you?

A. Yes, your Honor.

Q. If I choose not to sentence you under the Youth Corrections Act, rather to sentence you as an adult, I am not going to allow you to withdraw your plea on that basis. Do you understand that?

A. Yes, your Honor.

Q. Would you state, please, in your own words, factually what you did that makes you feel you are guilty of the charges contained in Count One of this Indictment.

Are there 13 or 14 over acts?

MR. IREDALE: Yes.

MR. LASATER: Yes, your Honor.

MR. IREDALE: Your Honor, I can give a factual basis and Mr. Bravo will assent that is correct.

His brother-in-law is a person named Raoul Solis. On one occasion in 1982 Mr. Raoul Solis offered Javier Bravo $1,000 [1 RT 9] to drive a truck from Los Angeles to San Diego. At some point Javier became aware that there was marijuana in the truck, which was after it arrived. Knowing that, he did nonetheless unload the boxes containing the marijuana.

BY THE COURT:

Q. Did you hear the statement of your

attorney Mr. Iredale?

A. Yes, your Honor.

Q. Is that a correct statement of your involvement in the case?

A. Yes, your Honor.

Q. Do your adopt that statement for purposes of entering a plea of guilty to Count One of the Superseding Indictment?

A. Yes, your Honor.

Q. Did you drive that truck containing marijuana within the county of San Diego?

A. Yes, your Honor.

Q. And that occurred sometime in the year 1982; is that right?

A. Yes, sir.

THE COURT: Does the Government agree there is sufficient factual foundation for the plea?

MR. LASATER: Yes, your Honor. Thank you.

THE COURT: Mr. Bravo, having in mind everything we have talked about up to this

time, including the maximum sentence that you can receive as a result of your plea of guilty to Count One of the Superseding Indictment, do you, first of all, have [1 RT 10] any questions with respect to anything that we have talked about thus far?

A. No, your Honor.

Q. Do you have any questions about the sentencing procedures of the Court?

A. No, your Honor.

Q. Is it still your desire to plead guilty in view of everything we have talked about up to this time?

A. Yes, your Honor.

Q. Any further areas of inquiry on behalf of the Government, Mr. Lasater?

MR. LASATER: No, your Honor. Thank you.

THE COURT: The Court finds that based upon the demeanor and physical condition of the Defendant his plea of guilty is made volun-

tarily and with a full understanding of the nature of the charges against him and the consequences of his plea. The Court therefore accepts the Defendant's plea of guilty.

THE CLERK: Mr. Bravo, now that you have been advised of your rights, the charges against you and the possible sentence, how do you now plead to Count One of the Superseding Indictment? Are you guilty or not guilty?

THE COURT: Guilty.

THE COURT: How about November 5 for sentencing, Mr. Iredale?

MR. IREDALE: Yes, your Honor.

[1 RT 11] THE COURT: The matter will be set for sentencing at 9:00 a.m. November 5, 1984. Mr. Bravo, you are ordered to return back to this courtroom on November 5, 1985 at 9:00 a.m. Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: See you then.

The motions are withdrawn?

MR. IREDALE: Yes. There were none pending; they have all been ruled on. Your Honor, there is one matter, while we are here, I would like to address the Court concerning.

I was approached by Mr. David Semco and Mr. Wheat, and Mr. Wheat has asked if I would try his case. The matter is set for trial on Tuesday; he is a co-defendant of Mr. Bravo's.

And I have talked to Mr. Wheat and Mr. Semco and agreed that I would be willing to do that.

I also wanted to make sure that I talked to Mr. Bravo and got his consent. I have talked to him. He has indicated to me he does not know Mr. Wheat, has no potential evidence or information he could give the Government against Mr. Wheat, and he has no objection to my representation of

Mr. Wheat.

I wanted if possible to let the Court know that, to make sure that was appropriate and proper under Rule 44C of the Federal Rules of Criminal Procedure.

[1 RT 12] THE COURT: Mr. Lasater.

MR. LASATER: Thank you, your Honor.

I first heard about this a few moments ago. It came as something of a surprise, since Mr. Semco had indicated to me the very-high likelihood of a disposition with regard to his client. Nonetheless, the Government is a little concerned with Mr. Iredale coming in at this stage to represent Mr. Wheat for at least two reasons: One, of course he still represents Mr. Juvenal Gomez-Barajas who has not yet been sentenced and whose sentence and guilty plea, of course, is always subject to change since if your Honor determines the plea bargain not to be appropriate, you

would allow him to withdraw the guilty plea.

Obviously, your Honor heard the name of Mr. Wheat, I think in excess of 30 times, during cross examination of Mr. Vidal in the Juvenal Gomez-Barajas trial, and clearly Mr. Wheat has a relationship of one sort or another to at least one of Mr. Iredale's present clients.

Also, while the Government does not have any information that Mr. Bravo specifically knows Mr. Wheat, there is always the possibility that he might be a witness with regard to the activities to which he has just plead guilty, which, of course, would corroborate the testimony of other different Government witnesses.

The Government has not specifically made any plans to call him as a witness but that is, of course, always a [1 RT 13] potential.

I think because of counsel's representation of two defendants in what he has very recently characterized to this Court as one, all-encompassing conspiracy in which Mr. Wheat is one of the major participants, that we would be walking on very thin ice were he to substitute in at this stage of the proceedings and represent Mr. Wheat.

THE COURT: Mr. Iredale, how about your representation at this time of Mr. Gomez-Barajas?

MR. IREDALE: Well, I have talked to Mr. Gomez when this became a possibility, and I asked him if he had any objection. He said no, I see no conflict in that matter.

But what I would like to do, if the Government has serious problems with it, is to make sure I talk again to Mr. Wheat and Mr. Semco, and also we could have Mr. Gomez here so that if there is any

allegation of conflict the Court can inquire.

Frankly, I see none. Mr. Gomez is not named in this Indictment and as far as I know is not involved in any way in the factual basis which would form the basis of this Indictment.

I, however, have some familiarity with the witnesses and I think that was Mr. Semco's thinking, that because I had tried the case and had some knowledge of the Government's witnesses and possibly some of their foibles, that it would be convenient for him to have me try the trial of the case which apparently [1 RT 14] has now become necessary.

Given the fact that I had another case which was resolved and I have nothing to do for the next two weeks, and I am familiar with this case, I decided that it would be in the interests of justice to go

forward.

So if your Honor would like I can arrange to have Mr. Semco, Mr. Wheat and/or Mr. Gomez here at an appropriate time, and if the Government has any inquiry that should be directed --

THE COURT: Well, since this matter has just been brought up and I really haven't had time to reflect on it, and I'm sure Mr. Lasater on further reflection may have additional items he would like to discuss dealing with your representation of Mr. Wheat, we ought to not decide on it now but rather bring it up at a later time.

We obviously have to have everyone present before any kind of decision could be made. By that I mean all interested parties. Trial being Tuesday-- I can see the two of you I know are dying to chat with one another about the prospect of Mr. Iredale representing Mr. Wheat. I

will give you that opportunity and suggest we all assemble at 9:00 o'clock Monday morning. I recognize that is very close to the trial but I can't do it tomorrow and there is no other time.

MR. IREDALE: The problem I have is this, your Honor: Frankly, I see no conflict. Mr. Wheat wants me to represent him; Mr. Gomez has no objection, his case is resolved and I [1 RT 15] don't even think Mr. Lasater's hope of resurrecting it constitutes any possibility; Mr. Bravo has nothing to say in this case and has no objection to it.

But if I am going to go forward I need to work on Saturday and Sunday.

As the Court knows, the weekend is a precious time.

THE COURT: I recognize that, but this being late Thursday afternoon and it being raised for the first time today, I cannot take care of it today. I have a sentencing

we are going to have to hear, and I think Mr. Lasater is entitled to some time to reflect on it and raise whatever objections he has.

If the clients have no objection and he has no objection, I can't conceive that I would.

MR. IREDALE: Yes.

THE COURT: But at least he should be provided with the opportunity to raise any objections he might have.

I recognize the bind it puts you in because of the short time between now and trial but by virtue of the fact that you were so familiar with the law and the facts in the other case, I don't suspect it would take you as long as it normally might to prepare for this trial.

Is Mr. Semco going to be with your in the trial, in any event, do you know?

MR. IREDALE: I don't know. We didn't discuss that.

MR. LASATER: Your Honor, I do feel compelled to note [1 RT 16] that in discussions with Mr. Semco he did express at least the potential desire of calling Mr. Iredale's previous client Mr. Juvenal Gomez-Barajas as a possible witness. That is another reason why I feel that there is at least the appearance of possible conflict.

MR. IREDALE: Well, this is the first I have ever heard of that. Mr. Gomez is not going to testify in an American courtroom ever again in his life.

THE COURT: Unless he is subpoenaed. At least he will be down here.

Why don't the two of you -- if you care to chat about it now, see if you can resolve it, and if you can't, the best I can do is tell you to have everybody here

at 9:00 o'clock Monday morning and I'll hear everybody and rule at that time.

Mr. Bravo, do you have any objection, based upon what you know of the situation, to allowing your attorney Mr. Iredale to represent Mr. Wheat in the trial coming up Tuesday, one of your co-defendants in that case?

THE DEFENDANT: No, your Honor, I have no objection.

MR. IREDALE: On Monday, then, does Mr. Bravo need to be here, your Honor?

THE COURT: No, Mr. Bravo need not be here since he expressed that. Unless there is something comes up that I don't know about that the two or three or four of you might discuss, where [1 RT 17] he might be a necessary witness.

MR. IREDALE: Mr. Bravo has indicated to me he never met Mr. Wheat, doesn't know Mr. Wheat from Adam, and even if the Government

wanted to call him he could not implicate Mr. Wheat in any way.

THE COURT: Mr. Iredale, in a recent case tried in this court, as I remember the testimony -- and I know I do not recall it as well as you do -- there were a couple of witnesses called to testify who, as I recall, could not identify your client but yet they were called. So it may be he could be called in the next trial. I don't know. But in any event, I'll see you Monday.

MR. IREDALE: I would hope the Government would not be engineering conflicts to try to get their selection of counsel for the case.

THE COURT: I can imagine Mr. Lasater would never engage in that type of activity.

MR. IREDALE: I don't think so.

THE DEFENDANT: Thank you, your Honor.

THE COURT: Don't forget, now, Mr. Bravo: Back on November 5, 1985 at 9:00 a.m. for

sentencing. Do you understand?

THE COURT: Yes, sir.

THE COURT: All right.

MR. IREDALE: Thank you, your Honor.

(proceedings adjourned.)

C E R T I F I C A T E

I, Mary T. Macfarlane an Official Reporter of the United States District Court, do hereby certify that the foregoing transcript was prepared from the official record of August 22, 1985.

JANUARY 26, 1986
MARY T. MACFARLANE, CSR # 3547

[1 RT 19] REPORTER'S TRANSCRIPT
26 AUGUST 1986 (MONDAY) 10:30 A.M.

THE CLERK: No. 3 on calendar, Case No. 85-0307, United States of America v. Mark Wheat for a status hearing re counsel.

MR. IREDALE: Your Honor, as to Mr. Gomez, we checked. He unfortunately has an ulcer and it began to bleed this morning. He had

to go with his family to the hospital to seek medical care. He was taken care of and he now is on his way here, but that was the reason he did not appear.

THE COURT: Thank you, Mr. Iredale.

MR. PANCER: Michael Pancer appearing for Gene Iredale and specifically as concerns conflict, your Honor.

MR. LASATER: Michael Lasater for the United States, your Honor.

MR. SEMCO: David Semco for Mr. Wheat, your Honor.

THE COURT: Mr. Lasater.

MR. LASATER: Thank you, your Honor.

I imagine the Court has had an opportunity to read the Points and Authorities and the Government's argument. The Government's position, your Honor, is that both because of what we perceive to be an actual conflict as well as the very clear appearance of a conflict, this Court should

decline the offer which is before the Court to substitute counsel in.

I think there are two main factors involved in this. One, of course, is Mr. Juvenal Gomez-Barajas, whose plea is by no [1 RT 20] means final since your Honor very well could decide after reviewing the probation report that the elaborate resolution of that case is not appropriate, at which time of course, he would have an opportunity to withdraw the plea and he would then be faced with the option of going to trial with his current attorney Mr. Iredale, who would then already have represented Mr. Wheat, whom the court is aware is a very major distributor of the marijuana we allege came from Mr. Gomez-Barajas.

There is also, of course, the matter of Mr. Javier Bravo which may or may not have been resolved.

I have spoken with Mr. Iredale his attorney and indicated to him I wish to have him as a witness. I have included his name in our proposed trial memorandum and in exchange for his testimony I have agreed to make a more favorable recommendation at the time of sentencing.

I have been advised by counsel that Mr. Javier Bravo would accept that offer to testify and would in fact be testifying.

We believe that while he does not identify Mr. Wheat, he obviously corroborates the testimony of some of the other witnesses, and it's our belief the marijuana which he would admit to delivering to the Bonita address on Robinhood, the residence controlled by Mr. Vidal, eventually a portion of that, somewhere in the neighborhood of 300 pounds, went to Mr. Wheat's house.

[1 RT 21] So I think Mr. Javier Bravo would be furnishing evidence adverse to Mr. Wheat. It would place Mr. Iredale in an untenable position since he would, in all likelihood, have the obligation to impeach the testimony of his own client Mr. Javier Bravo.

Also, again, your Honor, there is the potential in these types of situations where a Defendant possibly gets into trial, maybe during the course of the trial or afterwards when there has been a result which he does not believe to have been in his best interest, to say: "My waivers were not appropriate, I was confused. I want a new trial. There was an obvious conflict. How can the man who represents the person the Government believes to be the most involved member then later represent me when he still represents that other person."

I think because of the potential

for that, as well as the other matters I have brought forward, the Court should exercise its discretion and decline to accept Mr. Iredale as counsel.

THE COURT: Thank you, Mr. Lasater.

Mr. Pancer

MR. PANCER: Thank you, your Honor.

Your Honor, the primary concern that we would ask the Court to focus on is the right of Mr. Wheat to have counsel of his choice at this time.

After the original Gomez-Barajas case was concluded, Mr. Wheat discussed with his counsel Mr. Semco the possibility of [1 RT 22] having Mr. Iredale represent Mr. Wheat, because Mr. Iredale was thoroughly familiar with the informants who would be testifying against Mr. Wheat, because they were the same informants who had testified against Mr. Gomez.

Both Mr. Semco and Mr. Wheat

agreed that it would be clearly to Mr. Wheat's benefit to have represent Mr. Wheat someone who is familiar with the witnesses, familiar with the facts, and had been successful in impeaching those witnesses.

Mr. Wheat, who had been quite anxious about the coming trial, approached Mr. Iredale, Mr. Iredale agreed to be retained and alleviated a great deal of Mr. Wheat's anxiety. He felt very comfortable with Mr. Iredale, he has felt comfortable with him since they have discussed the matter, and Mr. Wheat very much wants Mr. Iredale to represent him and believes that no other attorney is in the unique position that Mr. Iredale is in in that he has already successfully cross examined the main witnesses against him.

So we have some very important-- the very important rights of Mr. Wheat at stake, and the likelihood that there would

be prejudice if Mr. Iredale cannot represent him.

We then must deal with the situation concerning Mr. Bravo. Mr. Bravo is present in court and he will , one, affirm to the Court that he has no objection to Mr. Iredale representing Mr. Wheat.
THE COURT: I believe he has done that once. This was, [1 RT 23] of course, before the most recent offer but I believe he did that the last time we were together.
MR. PANCER: There will be -- if Mr. Bravo testifies and if he is called to testify against Mr. Wheat, Mr. Iredale is familiar with the testimony and there will be no attempt to impeach Mr. Bravo. Mr. Bravo's testimony, by Mr. Iredale's view and Mr. Wheat's view, is helpful to Mr. Wheat. Mr. Bravo does not know Mr. Wheat and Mr. Iredale will have no problems if Mr. Bravo testifies; there will be no attempt to

impeach Mr. Bravo.

THE COURT: Let's assume for purposes of discussion, Mr. Pancer, if the impossible were to occur and Mr. Bravo were to change and testify differently, would Mr. Iredale then get on the witness stand and impeach him?

MR. PANCER: Your Honor, I think one of the problems of dealing with conflicts is that in many cases there is a potential conflict and what the Court has to do is determine if in fact, given all the probabilities, if there is a natural conflict.

Mr. Bravo is willing to tell the Court and tell Mr. Lasater the manner in which he intends to testify and that which he will say, and it's the truth.

Mr. Iredale believes what Mr. Bravo is testifying to is the truth and there will be no attempt to impeach.

I could assume a number of situa-

tions that would created a conflict for Mr. Iredale in this case; however, based on what is [1 RT 24] likely to happen, based on the representations of the actual participants involved, there is no conflict, and to create a conflict based on something happening that just there seems to be no likelihood of happening would appear to deprive Mr. Wheat of a very important right based on a very speculative set of circumstances which don't appear to be true.

Given that it is absolutely certain that Mr. Wheat would be deprived of the counsel of his choice and a counsel he believes is in a unique position to assist him, versus the very speculative kinds of things that the Court has just mentioned, it would seem, your Honor, that we have to favor Mr. Wheat's position or that the law would certainly favor Mr. Wheat's position.

As to the situation with Mr.

Gomez-Barajas, and that is counsel assuming that the plea bargain falls through and then Government counsel assuming that Mr. Wheat would have to be called, all I can say, Your Honor, is that is way too speculative a set of circumstances on which I think a Court can deprive a defendant of the counsel of his choice.

Again, we see no conflict, but again if the Court were to find a conflict, based on the cases we cited to the Court that conflict is being waived. Mr. Gomez would represent as soon as he can get here -- for health reasons he has been delayed- - he will waive any potential conflict, as will Mr. Wheat.

Now, the Government mentions that it's possible that Mr. [1 RT 25] Wheat, let's say down the road he gets convicted, could come back to the court and say there was not a proper waiver taken in the case

or something like that.

Again, your Honor, that is mere whimsical speculation. I've never seen a case in which the case was overturned because the -- in Federal Court -- because of a proper waiver of conflict. I have never seen such a case. Possibly Government counsel has one.

However, we have submitted cases where a conviction was overturned because the defendants were deprived of their counsel of choice, and clearly if we were looking at the probabilities it is much safer ground to take proper waivers pursuant to Rule 11 as the cases hold, to take the proper waivers and then nobody has -- none of the defendants could possibly have a complaint on which any conviction can be overturned.

The overriding right, according to the cases that we have cited, Garcia and

Armido-Sarmiento (phonetic), those cases say that a defendant's Sixth Amendment rights are primary and that as long as there is a waiver of any potential conflict Mr. Wheat is absolutely entitled to counsel of his choice.

The cases cited by the Government we hold are not applicable. The Holman case -- that is the Holson case cited by the Government. Let me just -- the Hobson case cited by the Government, your Honor, in that case, your Honor, the attorney himself, as the Court knows, was a potential witness at trial [1 RT 26] because-- and the attorney himself was a potential target in that case because it appeared that the defendants were in his offices putting together the drug deals and he was in and out of the office listening to this.

THE COURT: I agree that is clearly a different situation.

MR. PANCER: Okay. That leaves just the Dolan case. And again, your Honor, I think that that case would have been much stronger for the Government, but even that case says at the very, very worst it's discretionary with the Court. Assuming a conflict, assuming a waiver of the conflict, then the Court still has some discretion.

We think, your Honor, the cases we cited, which don't talk in terms of discretion but talk in terms of absolute Sixth Amendment rights that cannot be waived or interfered with by the Court, are the better holdings and the more accepted holdings.

Clearly, I think, your Honor, the path of least potential for him, least potential for error, is to allow Mr. Wheat to have Mr. Iredale, the counsel of his choice.

May I have just one moment, your Honor?

THE COURT: Surely.

MR. PANCER: Okay. Your Honor, if it would be permitted, Mr. Iredale would like to make a statement concerning the factual possibility of any sort of conflict.

[1 RT 27] THE COURT: Oh sure, That is fine, Mr. Iredale.

MR. IREDALE: Your Honor, it's my position there is no actual conflict nor even a potential conflict in this case, that what is occurring is that the Government is attempting to manipulate what they perceive to be potential conflicts in order to secure the exit of one counsel from the case in order to shop for attorneys, and that really is being done on a pretextual basis rather than a concern for avoided conflict.

With respect to the two issues

the Government has raised, though, let me indicate to the Court I see no actual conflict or even potential conflict.

First, as to the case of Mr. Gomez, the Government contends that if Mr. Gomez' plea agreement is rejected by the Court, he would be allowed to withdraw his plea and proceed to trial and I would represent him. They then say we might wish in that case to call Mr. Wheat as a witness.

That is absolutely incorrect.

Mr. Gomez proceeded to trial on a charge alleging a conspiracy to import and to distribute marijuana. The Court knows he was acquitted on that.

There is something called a double jeopardy clause which would preclude any re-trial.

In addition, there is another case which does not involve Mr. Wheat, a

separate marijuana conspiracy that was alleged. We made a motion to dismiss on double jeopardy grounds and the [1 RT 28] Court recalls the Government voluntarily dismissed that.

And suffice it to say, Mr. Gomez cannot be brought to trial on any marijuana conspiracy charges, and there is no allegation anywhere in the discovery or the Grand Jury that Mr. Wheat was involved in any other criminal activities with Mr. Gomez; that is, no allegation of any involvement in cocaine with Mr. Gomez, no allegation of any involvement in firearms, no allegation of any involvement in tax violations.

So even if the unlikely scenario that the Government portrays were to occur, the cases on which Mr. Gomez would go to trial would be cases in which Mr. Wheat is not even a conceivable witness.

So as to the attempt to resurrect or create a conflict with Mr. Gomez, I thought his case was resolved, I pray that it is resolved, as does, he, and I think at least for purposes of the government's attempted creation of a conflict here it is resolved, because they cannot bring him to trial on those marijuana charges; and on the other potential charges Mr. Wheat is not alleged in any of the discovery nor has it been alleged to me he was a potential witness of any kind.

Secondly, with respect to Mr. Bravo, the Government's disingenuous offer to him is one that I have accepted. If they will give Mr. Bravo probation he is glad to testify in court to everything he said under oath to your Honor.

I have talked to Mr. Bravo and Mr. Wheat and I will [1 RT 29] represent to the Court, as they will represent under

oath if the Government suggests it is necessary or the Court desires it, that at no time did they ever meet with each other, speak with each other, know each other, or hear each other's name until they appeared in this court when they were charged at one point in this case.

Mr. Bravo will testify truthfully as to what he did, but not only do I consider that testimony not to be harmful to Mr. Wheat, I consider it to be extremely helpful. And I appreciate the Government's willingness to put Mr. Bravo on the witness stand to elicit the truth. As a matter of fact, it will go a long way in establishing one of our defenses in the case, which has to do with a multiple conspiracy.

In any event, I have also talked to both Mr. Bravo and Mr. Wheat and explained to them the situation. Mr. Wheat has indicated he understood and is willing,

if there is even a potential or actual conflict, to waive his right to contest that in any way because he wishes me to represent him; and Mr. Bravo does the same.

I do not intend to use any confidential information or privileged communications to impeach Mr. Bravo. I can simply indicate to the Court that everything Mr. Bravo has indicated to me is consistent with his guilty plea in court and consistent with his trial testimony. So there is no conflict, and I believe the Government's attempt to call Mr. Bravo is an attempt [1 RT 30] to manufacture one in order to secure counsel of their choice. But it's not counsel of the Government's choice that should be given consideration but counsel of the Defendant's choice.

And I believe Mr. Semco just has one matter he would like to address.

MR. SEMCO: Thank you, Your Honor.

Your Honor, I'm not going to beat a dead horse. On behalf of Mr. Wheat, your Honor, I think it's important for you to know that Thursday morning my client and I, Mr. Wheat, talked about this issue of representation and talked about a number of things, including the recent -- the verdict in Mr. Juvenal Gomez-Barajas' case.

THE COURT: Excuse me. When you say Thursday, are you talking about August 22, last Thursday?

MR. SEMCO: Yes, sir. And it was on my recommendation, strong recommendation, after talking to some other attorneys in town that do criminal work, that we went over to Mr. Iredale's office and spent most of the day there; and at that time Mr. Iredale assured us that there was no conflict of interest.

And I think that I am probably one of four -- three attorneys and one

specialist in this field that has assured Mr. Wheat that if he is able to -- in fact that if he retains Mr. Iredale that he will have something very important on his side, someone who has interviewed -- excuse me, someone that has cross examined these very witnesses at a former trial that are [1 RT 31] going to be against him.

Now, Mr. Wheat was very frightened, almost, I would say, in a state of panic the latter part of last week about this.

He has already retained Mr. Iredale. That happened on Thursday. I guess the issue here is, the way it was explained to me, is that the Government is trying to prevent Mr. Wheat's attorney Mr. Iredale from representing him further -- because Mr. Iredale, your Honor, has already been privy to, I think, a very candid statement by my client.

THE COURT: Well, but, Mr. Semco, you are Mr. Wheat's attorney as you stand here right now. Mr. Iredale has not -- he has asked me to be substituted in. I have to approve that order.

What the Government is doing is saying they don't want Mr. Iredale and we should proceed to trial with you.

MR. SEMCO: When I say, "his attorney," I mean my client has done everything he can to, and has treated Mr. Iredale as his attorney, has talked with him; I'm sure told him everything about the case. And then I gave all my files to Mr. Iredale on Thursday -- and I mean everything. I didn't retain anything, and I haven't seen any part of this case as far as the work on it is concerned or the files in it since Thursday afternoon.

MR. LASATER: Your Honor, I think this is irrelevant to the matter that is currently

before your Honor as to whether there is a conflict, your Honor.

[1 RT 32] MR. SEMCO: Well, your Honor, may I suggest why I think it is relevant.

THE COURT: Sure. Go ahead.

MR. SEMCO: Because Mark Wheat's feelings are relevant and I would like that to be put into the equation.

THE COURT: Well, we can all agree, I think, for purposes of this discussion that it is your client's desire to retain Mr. Iredale.

MR. SEMCO: Yes, sir. And I would like to urge you to allow that to happen on his beha]

THE COURT: All right, sir.

MR. IREDALE: One other matter, your Honor.

THE COURT: Surely.

MR. IREDALE: I'm prepared to try this case. I will not request a continuance. This case is set for trial tomorrow morning

at 9:00 o'clock; I'm prepared to try the matter. I have reviewed all of the files, talked to Mr. Wheat, we have conducted the investigation we thought was appropriate. I'm not going to ask for a single minute of continuance, there will be no disruption of the Court's calendar, and I am fully prepared to go to trial on the matter, having spent a night and the bulk of this weekend in a thorough review of this matter, and also yesterday afternoon, all afternoon, in discussions with Mr. Wheat.

So I hope that your Honor rules on this with these [1 RT 33] considerations in mind.

MR. SEMCO: Including the Sabbath.

THE COURT: Yes, Mr. Lasater.

MR. LASATER: Yes, your Honor. A very brief response. Counsel had indicated there would be no cross examination of Mr. Javier Bravo because they believe his testimony would be

truthful.

Well, your Honor, in many years of practice I've seen very effective cross examination of witnesses who, of course, are being truthful. Simply because counsel does not believe the witness is lying does not mean he will not do his job and try to weaken the other side's case by appropriate attack. And in fact I would note the Court is probably very well aware that Mr. Gallegos and Mr. Witschger both testified in a manner very similar to the way we anticipate Mr. Javier Bravo will testify and they were subjected to a rather thorough cross examination by Mr. Iredale. I would assume the same would take place as to Mr. Bravo.

When I talked about a possible change of mind on the part of Mr. Wheat what I am thinking about on that, your Honor, is a guilty verdict and an appeal.

Suppose that is by one who doesn't share the same views, because he would be representing his client's interests as he sees them, and he gets an affidavit or statement that his client was misadvised by these attorneys: I thought my rights were being protected and they aren't.

[1 RT 34] Where are we then?

There has been a suggestion that the Government has gone shopping for counsel. We would note Mr. Semco has been Mr. Wheat's counsel of choice -- in December of last year and in April when the Indictment was brought which was for the case which is set for trial tomorrow. He has been his exclusive trial counsel until last Thursday, the eve of trial.

The Government is not trying to choose counsel. Mr. Wheat has done a fine job of choosing counsel. The Government's belief is that on the eve of trial new

counsel which the Government believes has a very heavy conflict in the case should not be substituted in.

Mr. Gomez' case the Government hopes has been laid to rest, but obviously it is still up in the air, and to say that Mr. Wheat is not potentially a witness I think overlooks a couple of rather critical matters: First, it's the Government's position that the marijuana charges are not dead. Our motion, which the Court granted, was to dismiss those charges without prejudice. They can be relitigated, I believe. I'm sure there would be motions and an appeal, but they are not forever gone.

But beyond that, the tax charges are clearly still viable, and as part of the tax case, evidence of marijuana activity would be relevant and admissible to show the source of income and Mr. Wheat

very well could be a witness in that particular situation.

[1 RT 35] THE COURT: You mean assuming they proceed on a net worth theory, how the wealth was accumulated?

MR. LASATER: Yes, your Honor. Yes.

Generally then, your Honor, it's our feeling that the Court in exercising its supervisorial powers and its discretion in managing the matters of attorneys which appear before the Court should exercise its discretion, should follow the cases which we have cited, and should decline to accept the substitution of counsel at this time.

THE COURT: All right. Thank you, Mr. Lasater. Mr. Pancer, anything further?

MR. PANCER: Very briefly, your Honor.

Again, counsel has not cited to your Honor one case in which after a proper waiver in a similar situation the defendant -- and then a conviction, the defendant has

been able to overturn the conviction, yet we cited Garcia and another six cases very similar, very similar situations in which the substitution was not permitted that the conviction was later overturned because the defendant did not have the counsel of his choice.

Again, they are trying to use the most speculative kinds of circumstances to urge the Court to permit the substitution when the probabilities are that if Mr. Wheat is deprived of counsel of his choice then we have clearly, I think, your Honor, the worse record.

[1 RT 36] While there may be cross examination of Mr. Bravo there will be no attempt to impeach Mr. Bravo. That is counsel's representation.

As far as any counsel giving contrary advice later on, I mean the record will be very clear that I have interviewed

Mr. Bravo, Mr. Semco has interviewed Mr. Wheat and was his counsel, Mr. Iredale has also; and everybody is advising that this is in the best interests of Mr. Wheat and there is no contrary interest or there is no detriment to either Mr. Bravo or Mr. Gomez.

So why not permit the substitution?

THE COURT: All right. Anything further?

MR. IREDALE: Mr. Wheat and Mr. Bravo are available for any inquiry the Court might have. Mr. Gomez is on his way here, and I have already thoroughly discussed the matter and would represent he indicated to me he has absolutely no objection, that if there is any conflict he would be more than willing to waive it in my representation of Mr. Wheat.

THE COURT: All right. Well, as far as the Ninth Circuit is concerned, it appears we

are sailing in uncharted waters. The two cases, Mr. Pancer, you cited are, I guess, the Fourth or Fifth and Eleventh Circuits. I just frankly am not aware of any Ninth Circuit authority on this precise issue before the Court at this time.

I guess preliminarily I can say that no one promised the [1 RT 37] job would be easy; sometimes you have to make very tough decisions.

I should state initially that although the conversation may have occurred earlier than last Thursday about the possibility of substituting in Mr. Iredale as Mr. Wheat's counsel, it was first brought to the attention of this court on last Thursday afternoon, August 22, 1985, following the entry of the plea of guilty by Mr. Iredale's client Mr. Bravo. Up to that point certainly I was under the impression, as I think the Government was,

also, that Mr. Wheat would be represented by Mr. Semco.

I know for the last couple of weeks he has been calling almost every day speaking to either my court clerk or to my reporter requesting various transcripts and so forth, and it appeared to us that he would be trial counsel.

It is unfortunate this matter was not brought to the Court's attention sooner, rather than a couple of days, a couple of court days before the trial was due to commence.

I think based upon the representations of the Government in their memorandum that the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is

denied.

Now, recognizing that there is no Ninth Circuit [1 RT 38] authority, I assume you would like to proceed to a higher court immediately with a writ to test this.

MR. IREDALE: Your Honor, in this matter the law is such that if the defendant wishes an interlocutory appeal, it's not interlocutory appealable. The Supreme Court decided that in the Flannigan case.

Now, if counsel -- I think, though, it would be in everybody's best interests to resolve this pre-trial if that could be done without the Government's objection.

THE COURT: Let's hear what Mr. Lasater says.

MR. LASATER: Well, your Honor, counsel was about to explain to the Court a case which he is uniquely familiar with since I believe he handled the amicus brief in

that. I am not personally familiar with that case but it's my understanding that the Supreme Court has spoken on what, in essence, is precisely this issue, and has said there is no interlocutory appeal. That would be, I suggest, the law of the land, and while it might be convenient for counsel to have an interlocutory appeal, in the case of Supreme Court opinion to the contrary I suggest it would not be the best course to follow.

Also, your Honor, the Government is prepared to go to trial. I would indicate that the co-defendant Mr. Sanchez-Cretin is apparently also prepared to go to trial, at least that is what Mr. Ronis has advised me.

[1 RT 89] If, in fact, we go to trial and the Ninth Circuit when it reviews this on first impression decides that by some chance the Court was wrong, we haven't

really expended unnecessary resources since the trial would be proceeding an any event.

I suggest that we go through-- this trial has been set for quite some time, the Government has gone to the expense of bringing in witnesses from outside of the jurisdiction. The Court is well aware of the security concerns when these people are in town, and we would prefer to proceed.

THE COURT: Mr. Pancer, what is your view of all this?

MR. PANCER: Unfortunately, it would appear that there is no interlocutory appeal, according to the case Mr. Lasater referred to.

THE COURT: There is no possibility of any writ you can take up right away?

MR. PANCER: Your Honor, the only way I can think of to do it -- and I don't know how we can do it in a way that made sense--

it's possible the Government would have an interlocutory appeal had the ruling gone against them, which was one of the reasons I would urge upon the Court, because then we would save a trial and have the issue resolved without having gone through the trial.

We can just take the rest of the day, independent of the trial, to see if there is any way we could certify it for some kind of interlocutory appeal.

[1 RT 40] THE COURT: Mr. Pancer, if I may interrupt, let me suggest this: We may be reconvening later today after you have had a chance to look at it, if you are available, and see if there is some way we can solve the problem. Certainly I have no problem putting this over a couple of days and starting the trial, assuming the Government has no objection and witnesses are available. Beyond that, I think I'm

going to have to order the trial to proceed. It's been set for so long.

And again, one of the major problems created in this situation is the fact it was not brought to the Court's attention until late Thursday afternoon.

MR. SEMCO: Your Honor, may I address that one issue? The first time Gene Iredale's name passed between my client and I was the morning of the same day you learned of it.

THE COURT: Mr. Semco, I'm not criticizing anybody for this, don't misunderstand me, I'm just saying when it was brought to the Court's attention.

Are you available, say at 3:00 o'clock this afternoon, Mr. Lasater?

MR. LASATER: Your Honor, I have a brief matter in front of Judge Gilliam at 2:00 o'clock. I also have another at 11:00 today, and I have an involved bail hearing before Magistrate Gonzalez, which your

Honor is aware of, at 4:00 p.m.

I would suggest at 3:00 I would be available if we thought we could conclude it in time for the bail hearing.

[1 RT 41] MR. PANCER: Your Honor, I think 3:00 would be fine. I would only ask, then, that the Court mentioned putting the trial over a couple of days. If the trial could start approximately Thursday that would give us a chance. Mr. Semco needs time, your Honor.

THE COURT: What about that, Mr. Lasater? What is your position with respect to witnesses?

MR. LASATER: Your Honor, the witnesses are here at some expense to the Government. It's the Government's position that unless some appellate court was to take some action to set aside your Honor's ruling we should proceed to trial tomorrow.

If Mr. Semco is in the posture of

indicating to the Court he is not prepared to proceed, then it would be the Government's position that sanctions should be imposed, because of the additional expense incurred by the Government when this date has been known for quite some time.

THE COURT: Mr. Semco, are you ready to proceed to trial tomorrow morning?

MR. SEMCO: No, your Honor.

MR. LASATER: The Government would request sanctions, your Honor.

THE COURT: How soon will you be prepared to proceed?

MR. SEMCO: Your Honor, if I could have four days, just to bring myself up to the speed I should have been. Of course, I worked on the case for many months, that's true, and -- but [1 RT 42] some of the last transcripts we just rushed right over to Mr. Iredale's office. I haven't read some of them. If I could have just a few days,

your Honor.

Quite frankly, -- in any event, I was hopeful that I would be doing other things.

THE COURT: Any further comment on that, Mr. Lasater?

MR. LASATER: Your Honor, the Government incurs substantial expense in these circumstances. The witnesses have been relocated for security reasons. As Mr. Iredale can attest to, because I think he had to pay for the transportation of one of those witnesses, at one time, it cost the Government approximately $400 each to bring them to Court and costs us at least $105 a day to maintain them here in San Diego.

THE COURT: All right. The court's order will be the following: Trial will be continued until Wednesday at 1:30.

And, Mr. Semco, all we will do Wednesday afternoon is select the jury. We

will not be in session Thursday, so you will have all day Thursday to prepare, and we will resume Friday.

MR. IREDALE: Your Honor, we are coming back at 3:00 o'clock? I take it the Court's ruling is unequivocal and not subject to reconsideration.

THE COURT: Yes.

MR. IREDALE: Because I would indicate to the Court, for purposes of the record, if your Honor wants to engage in [1 RT 43] colloquy, that is fine.

THE COURT: No, Mr. Iredale, I don't want to do that. You have heard my ruling, and to the extent you can work something out on appeal I will talk to you about that at 3:00 o'clock.

MR. IREDALE: I was just going to indicate a couple of things. First, Mr. Wheat and Mr. Bravo are both in court and are prepared to indicate --

MR. PANCER: Excuse me, your Honor, is the Court accepting our offers of proof for the purposes of this record in terms of what we stated Mr. Bravo and Mr. Wheat and Mr. Gomez would testify to?

THE COURT: I think basically that is what I am saying, that I assume they would get up and testify there is no conflict based on whatever questions may be posed to them by you. Mr. Lasater?

MR. LASATER: Your Honor, I was just getting ready for departure.

THE COURT: Oh, all right. See you at 3:00 o'clock.

MR. LASATER: Thank you very much.

MR. IREDALE: Your Honor, if called they would indicate, first of all, they believe there is no conflict, but they have discussed all the matters we discussed here in court and if there were those actual and potential conflicts they would be more than

willing to waive them. We are not engaging in any [1 RT 44] collateral attack of any conviction and would request that the Court allow us to act in the fashion we suggested to your Honor.

THE COURT: Thank you, Mr. Iredale.

MR. IREDALE: Also, just for purposes of the record, I would indicate that the first time ever in the whole case that the Government ever suggested that they wanted to call Mr. Bravo as a witness was on Friday morning of last week.

MR. LASATER: That is untrue, your Honor. It was done here in open court Thursday at the change of plea.

THE COURT: Yes, Thursday afternoon at the time of the plea.

MR. IREDALE: That was the first time, and only after there was an indication I would be representing Mr. Wheat, and I believe it's only for the pretextual purpose of

allowing the Government to secure their choice of counsel. In the many months I represented Mr. Bravo, not one time ever did Government counsel ever suggest to me that they wanted him to be a witness, not once in the six months this case has been going on.

THE COURT: All right. Mr. Wheat, you are ordered to return to this courtroom Wednesday, August 28, 1985, at 2:00 p.m. for trial. Do you understand?

THE DEFENDANT WHEAT: Yes, your Honor.

MR. LASATER: Your Honor, is that trial matter also continued as to Mr. Sanchez-Cretin?

[1 RT 45] THE COURT: Yes, the trial will be continued to Wednesday. If you will notify his counsel.

MR. SEMCO: Your Honor, Mr. Wheat needs to be present this afternoon.

THE COURT: That is up to you. I don't need

to have him here.

(Proceedings adjourned.)

C E R T I F I C A T E

I, Mary T. Macfarlane, an Official Reporter of the United States District Court, do hereby certify that the foregoing transcript was prepared from the official record of August 26, 1985.

JANUARY 29, 1986
MARY T. MACFARLANE, CSR # 3547

[1 RT 46] REPORTER'S TRANSCRIPT 26 AUGUST 1985 (MONDAY) 3:15 P.M.

THE CLERK: No. 3 on calendar, Case No. 85-0307, United States of America v. Mark Wheat for a status hearing re counsel.

MR. PANCER: Michael Pancer appearing specially for Gene Iredale on the conflict issue, your Honor.

MR. LASATER: Michael Lasater for the United States, your Honor.

MR. SEMCO: David Semco for Mark Wheat, who

is present.

THE COURT: And Mr. Iredale,

MR. IREDALE: Yes, your Honor.

THE COURT: And Mr. Wheat is present.

MR. PANCER: I apologize for my earlier lack of client control but I think I reasserted myself.

THE COURT: Thank you. I looked at the two cases you brought my attention to. Thank you, Mr. Pancer. Do you want to discuss the matter of the appellate issue?

MR. PANCER: Yes, your Honor.

As I understand it, Flannigan originally came to the Supreme Court in an effort to resolve a conflict that existed in the circuits as to whether or not a conflict could be waived. The Third Circuit said no and I think the Second and Fifth said yes, you can waive conflicts, but when it got to the Supreme Court, rather than resolving that issue, they resolved the

case on the issue of that you can't bring this issue by way of a [1 RT 47] pre-trial appeal. And we think that Gregor, which we cited, anticipated that that might be the result and they set forth another manner in which the issue could be resolved, and that is in terms of by way of mandamus and a stay from the Court as to the trial.

And if it is necessary to go through an appellate procedure, that is what we are going to request, although, your Honor, I must say that when we were here earlier, we had no Ninth Circuit law to present to the Court and --

THE COURT: I don't want to reargue, Mr. Pancer, please.

MR. PANCER: Okay. Then we will submit that matter, your Honor, just based on the new cases we were able to supply to the Court which is Gregor and Parkin, which we hold our position to be correct.

In any event, we would ask your Honor, then, for the stay so that we may file a Writ of Mandamus pursuant to what seems to be the holding in Gregor.

THE COURT: How long would it take you to have your writ prepared?

MR. PANCER: If I could have just one moment, your Honor. Your Honor, two to three weeks I think would be sufficient to prepare the writ.

THE COURT: I have a feeling Mr. Lasater is not going to be willing to stipulate to a two-week continuance. Let's hear from Mr. Lasater.

[1RT 48] MR. LASATER: Thank you, your Honor.

Your Honor, as the Government indicated earlier today and we continue to indicate, we are ready to proceed to trial. In anticipation of this trial, which has been on the Court's docket for a number of

months, we have brought here witnesses from different locations throughout the United States, a number of witnesses, and we are comfortable in the propriety of the Court's earlier ruling.

We believe that any appeal process involving this issue can be adequately addressed post conviction and we think that the most appropriate procedure would be to go forward with the trial as currently set.

MR. PANCER: Your Honor, I would just say in terms of judicial economy and expense and so on and so forth, the issues Mr. Lasater is addressing, I think it's clear, your Honor, we are not out on left filed on this issue, that this appeal would certainly not be frivolous, and at worst we are facing I think what appears to be a split in the circuit on these issues.

So given, I think, the serious-

ness of the issues involved, it would be certainly more economical to resolve it without going through what I am told could be a two-week trial and wasting two weeks of court time and all the expense involved in that. We are talking many, many thousands of dollars, whereas if we resolve the issue now we can at least cut that to a minimum.

[1 RT 49] Also, in terms of Mr. Wheat's rights it would seem, your Honor, to be a fair way to handle the matter. Why should he have to go through a trial twice assuming we are correct. The Government will only go through a trial once if they are correct, no matter what procedure your Honor follows, but if we are correct there will be two trials; and I think, your Honor, there is no way to look at it, that it doesn't make sense but to grant us a stay so that we can conserve court resour-

ces, Government time and Mr. Wheat's resources in putting on his own defense. It's very expensive for him also to put on his case and he doesn't want to have to do it twice, your Honor.

THE COURT: Well, you know, one of the things that troubles me about this whole thing, and admittedly it's a difficult call for me, is that Mr. Wheat retained counsel of his choice initially. His counsel has been apparently properly representing him all through this case for months and months and months and up until Thursday of last week was, I guess, getting transcripts and at least indicating, not directly to me obviously because I don't have any contact with counsel exparte, but by what he was doing that he was ready, willing and able to proceed with this trial tomorrow morning at 9:00 o'clock. And then all of a sudden we are faced with this last minute problem

and I'm faced with whether I'm going to have to have hearings with respect to these conflict issues, call the defendants in here, put them on the stand, go through hearings,[1 RT 50] and I just think it's too late to get involved in this.

I recognize Mr. Wheat has a constitutional right to counsel of choice but he, of course, made that choice a long time ago and hired Mr. Semco. So I just think it's too late in the game to get involved in this.

If you can get an Order staying the trial, Mr. Pancer, then I will have to ask you do that. Absent that, I have already continued the trial until Wednesday afternoon and I assume that would give you time to get some kind of emergency writ by the Ninth Circuit.

MR. LASATER: Your Honor, the one thing I would also note is this is a two-defendant

trial. We have Mr. Sanchez-Cretin so there would be multiple trials regardless of the argument made by counsel.

MR. PANCER: Unless, of course, Mr. Cretin was willing to wait until this issue would be resolved, which I can't represent to the Court either way, but if it were an issue I would be glad to check and find out if Mr. Cretin would be willing to waive.

But given the Court's ruling --

THE COURT: I know everybody feels very strongly about this issue and, as I say, making these decisions is not easy and this is difficult, but I have done the best I can with the facts before me and called it the way I think it should be called.

So the trial is scheduled for Wednesday afternoon, and I think what I will require you to do, Mr. Pancer, is try and get a [1 RT 51] stay from the Ninth Circuit. That is another reason I continued

it. I assumed this might come up, so you would have time still to get the writ filed.

MR. PANCER: Yes, your Honor. And also, for the record, it was never Mr. Wheat's intention to try to delay the trial. In other words, that was not the purpose of hiring Mr. Iredale. In fact, he expected if he hired Mr. Iredale he would go to trial tomorrow morning.

THE COURT: Mr. Iredale made that point very clear that he is ready willing and able to proceed to trail tomorrow morning at 9:00 o'clock. I'm not suggesting Mr. Wheat's intention was to delay the trial. That is not the reason I am denying the motion.

MR. SEMCO: Your Honor, may I be heard on the issue of the time we are allowed to get the writ going?

It's likely to become my respon-

sibility to at least get that in motion, and I am going to be asking for help probably from some local attorneys, maybe Chuck Sevilla if he has the time. I don't want to lose this courtroom. I understand that there is vacation schedules to be considered. That is just a detail, but if we could have a couple of more days on this writ then it's more likely to happen.

Is it possible for us to have until Monday instead of Wednesday?

THE COURT: Again, we have another defendant to consider [1 RT 52] who is set to go to trial and we have witnesses who are here from, apparently, somewhere out of the community at great Government expense, and I think I'm going to have to hold you to Wednesday afternoon at 2:00 o'clock. That gives you all day tomorrow and Wednesday morning to prepare the basic outline of a writ and I'm sure if the Circuit Court

feels it's appropriate to stay it they will give you ample opportunity to brief it.

You can certainly make known to them the rather clear issue presented to this court and if they rule it's appropriate, so be it.

MR. SEMCO: Your Honor, not to quarrel with the ruling, but I guess I'm the one, I suppose, that represents Mark Wheat still at this time, and I would like the record to be quite clear on the fact it isn't Mr. Wheat is complaining that his present counsel isn't good enough for him, it's that he sees, and I have advised him, that there is a clear legal advantage in having the lawyer who has just cross examined these witnesses now work for him, and it is that kind of representation he is trying to get on his defense team.

THE COURT: I don't question that at all. Were I in his position I'm sure I would

want Mr. Iredale representing me, too. He did a fantastic job in that trial and I'm sure Mr. Wheat would like to have him representing him.

But, in any event, for the reasons I stated I have made the decision I think is appropriate under the circumstances, so [1 RT 53] the trial will remain scheduled to commence Wednesday at 2:00 p.m.

MR. PANCER: Thank you, your Honor.

MR. SEMCO: Thank you, your Honor.

MR. IREDALE: Thank you very much, your Honor.

MR. LASATER: Thank you, your Honor.

(Proceedings adjourned.)

C E R T I F I C A T E

I, Mary T. Macfarlane, an Official Reporter of the United States District Court, do hereby certify that the foregoing transcript was prepared from the

official record of August 26, 1985.

JANUARY 28, 1985
MARY T. MACFARLANE, CSR # 3547

SUPREME COURT OF THE UNITED STATES

No. 87-4

Mark Erick Wheat, Petitioner

v.

United States

ORDER ALLOWING CERTIORARI.
Filed October 5, 1987

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to question 1 presented by the petition.

PETITIONER'S

BRIEF

(5)

No. 87-4

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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Mark Erick Wheat

QUESTION PRESENTED FOR REVIEW

1. Whether Government-sought disqualification of defense counsel in a criminal case, after all potential conflicts were waived, violated the Sixth Amendment right to counsel.

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No. 87-4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

Petitioner, Mark Erick Wheat, requests that the judgment below be reversed because the petitioner was improperly deprived of his Sixth Amendment right to defense counsel of his choice.

OPINION AND JUDGMENT BELOW

The opinion of the Court of Appeals affirming the petitioner's conviction and sentence is officially reported at 813 F.2d

1399 (9th Cir. 1987).[1] The judgment and commitment of the district court is Document 112 in the Clerk's Record (JA 8).[2]

STATEMENT OF JURISDICTION

On 2 April 1987 the Court of Appeals entered judgment affirming the conviction of the petitioner for conspiracy and possession with intent to distribute marijuana. On 3 June 1987 his Petition for Rehearing and Suggestion for Rehearing En Banc was denied. (Pet. App. B.) The petition for certiorari was docketed in this Court on 29 June 1987.

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[1] Appendix A to the Petition for Writ of Certiorari (Pet. App. A).

[2] "JA" refers to the Joint Appendix. "CR" refers to a document contained in the Clerk's Record portion of the appeal, and the numbers after the colon refer to the pages in that document. "RT" will refer to the six volumes of the trial transcript. The in camera hearing with defense counsel is designated "23 May 85 RT," and this transcript is a part of the Excerpts of Record furnished to the court of appeals. Additional docket entries of co-defendants Gomez-Barajas and Bravo and a transcript of attorney Iredale's appearance for Bravo (24 Apr 85) have been submitted to the Clerk of this Court.

This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Federal Rule of Criminal Procedure 44(c):

> **Joint Representation.** Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

STATEMENT OF THE CASE

Indictments

In December 1984 the petitioner with 23

others including Juvenal Gomez-Barajas and Javier Bravo was charged with conspiracy and possession with intent to distribute in excess of 1,000 pounds of marijuana (21 U.S.C. 841(a)(1), 841(b)(6), and 846).[3] In April 1985 to prevent misjoinder and related problems the defendants and charges in the earlier indictment (CR 84-1099) were split into three separate indictments (CR 85-307, -308, and -309). The petitioner and Bravo were named in common and different counts in the single indictment, CR 85-307.[4]

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[3] United States v. Gomez-Barajas, et al., CR 84-1099, So. Dist. Calif. Gomez-Barajas earlier in 1984 had been arrested on related charges (CR 84-646) which were consolidated in CR 84-1099. The procedural history of the case is detailed in the district court's order and memorandum denying pretrial motions (CR 64: 2-3).

[4] This indictment, CR 85-307, charged 14 defendants, including petitioner and Bravo, but not Gomez-Barajas. In June 1985 additional overt acts were added in Count 1 (conspiracy) by way of a superceding indictment (CR 85-307; JA 14).

In the conspiracy counts (1 and 12), petitioner and Bravo were named but in different overt acts (JA 16-25, 31; CR 48:2-8, 19). Bravo was charged in substantive count 5, and petitioner was charged in substantive

Unobjected Joint Appearance of Iredale

In June 1984 attorney Iredale appeared on behalf of Gomez-Barajas. On 24 April 1985 attorney Iredale without objection from the Government or inquiry by the court also appeared on behalf of Bravo, who was previously represented by appointed counsel.[5]

Pretrial Ex-parte Hearing with Defense Counsel

On 23 May 1985, three months before trial, the district court summoned petitioner's counsel to his chambers with notice to the prosecutor but not the petitioner. (23 May 85 RT 102.) The court revealed that a law clerk had provided information that

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counts 6-11. (JA 14; CR 48). Petitioner was acquitted of counts 11 and 12 (JA 5; CR 81). Bravo and petitioner were not charged in overlapping activities.

[5] Up to this time Bravo had been represented by appointed counsel, who was then relieved as counsel of record because Bravo wanted attorney Iredale as his lawyer. Partial Transcript, 24 Apr 85.

defense counsel "currently"[6] had a significant substance abuse problem (23 May 1985 RT 1). The judge confronted defense counsel with a report from the judge's law clerk "that you are taking heroin and cocaine" (23 May 1985 RT 2). The court said it did not expect him to admit, deny, or do anything about these charges (23 May 1985 RT 1-2). Defense counsel acknowledged that it was the first time he was "confronted by this officially" (23 May 1985 RT 2) and characterized these as "former problems with liquor and drugs" (23 May 1985 RT 3). The court directed its inquiry to the defense counsel's "substance abuse problem" and his ability to adequately represent his client (23 May 1985 RT 3). Defense counsel had disclosed to his client

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[6] The trial judge referred to an accusation of current drug usage which implicates present criminal misconduct (21 U.S.C. 841(a), 844). The Court of Appeals opinion overlooked this statement and characterized defense counsel's involvement as "past narcotic and alcohol abuse" and "past abuses" (Pet. App. A 11).

that he attended AA but asked that the meeting with the judge not be disclosed to his client. (23 May 1985 RT 4.) Defense counsel recognized he was a "disabled person" (23 May 1985 RT 4) and participated in a local lawyers' disability program (23 May 1985 RT 5). Defense counsel inquired of the judge as to a possible accuser (23 May 1985 RT 7-9) and asked, "How does this affect me? What might I expect, both the good and the bad?" He also asked whether there would be follow up by the judge (23 May 1985 RT 9-10).

Resolution of Gomez-Barajas' Cases

On 2 August 1985 Gomez-Barajas, represented by attorney Iredale against the same prosecutor and before the same judge as in this case was acquitted by a jury in CR 85-308.[7] (JA 13). The Government's principal

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[7] After the split into three indictments, Gomez-Barajas was named in two (CR 85-308 and 85-309) in addition to the still pending CR 84-1099. (CR 64-3). On 9 August 1985 the court upon the Government's motion dismissed the charges in CR 85-309. (JA 13-14; CR 78).

witness had been Victor Vidal. After the acquittal of Gomez-Barajas and before petitioner's jury trial attorney Iredale successfully reached a settlement of the remaining charges against Gomez-Barajas in CR 84-1099. Gomez-Barajas had pleaded guilty to tax evasion and smuggling merchandise and was to receive a sentence of not more than 365 days of actual confinement.[8]

Resolution of Bravo's Case and Retention of Attorney Iredale for Petitioner

On 22 August 1985, five days before the scheduled trial date of 27 August 1985, co-defendant Bravo, also represented by attorney Iredale, entered a plea of guilty

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On 18 September 1987 the Government dismissed the remaining counts against Gomez-Barajas in CR 85-308. (JA 13).

[8] On 15 November 1985 Gomez-Barajas was finally sentenced to 450 days (with credits this would be 365 days) confinement and a probationary term. These matters from the files of the District Court for the Southern District of California may be judicially noticed by this Court. Fed.R. Evid. 201(f); **United States v. Wilson**, 631 F.2d 118, 119 (9th Cir. 1980).

pursuant to negotiations which called for a probationary sentence with no more than 30 days confinement (JA 47-48; 1 RT 4-5). The factual basis for Bravo's plea of guilty was that in 1982 he drove a truck containing marijuana for his brother-in-law Solis from Los Angeles to San Diego for $1,000 (JA 53-54; 1 RT 8-9).

At the time the plea of guilty of Bravo was accepted by the court, attorney Iredale announced that the petitioner and his then defense counsel had agreed that Iredale would try petitioner's case, in which Vidal would again be the principal witness, the following week. (JA 57; 1 RT 11; CR 74:3-4).

Bravo had no objection to attorney Iredale representing the petitioner (JA 57, 66; 1 RT 11, 16), and attorney Iredale stated: "He [Bravo] has indicated to me he does not know Mr. Wheat, has no potential evidence

or information he could give the Government against Mr. Wheat, and he has no objection to my representation of Mr. Wheat." (JA 57, 66-67; 1 RT 11, 17). The prosecutor expressed some surprise because then defense counsel had indicated to him a very high likelihood of a "disposition" in petitioner's case (JA 58; 1 RT 12). The prosecutor expressed concern about Iredale's continued representation of Gomez-Barajas, Bravo, and petitioner. He argued that there was a possibility that Gomez-Barajas would withdraw his plea if the judge did not give the agreed upon sentence. The prosecutor claimed that during the trial of Gomez-Barajas, Vidal made "in excess of 30" references to the petitioner and surmised there was "a relationship of one sort or the other" between Gomez-Barajas and petitioner. (JA 59; 1 RT 12).

Gomez-Barajas had no objection to attorney Iredale representing petitioner, and

attorney Iredale saw no conflict. (JA 60; 1 RT 13).

As to Bravo, the prosecution noted, "there is always the possibility he might be a witness," but he added "[t]he government has not specifically made any plans to call him (Bravo) as a witness but that is, of course, always a potential." (JA 59; 1 RT 12-13).

The district court continued the matter until the following Monday, the day before the jury trial was to start, to have all the interested parties present and to allow the prosecutor to raise objections (JA 62-63; 1 RT 14). The court stated: "If the clients have no objection and he [prosecutor] has no objection, I can't conceive that I would." (JA 64; 1 RT 15). The court also recognized that attorney Iredale was already familiar with the law and facts in Gomez-Barajas' case and would not need as much

time to prepare. Attorney Iredale hoped the Government was not "engineering conflicts to try to get their selection of counsel for the case." (JA 67; 1 RT 17).

Disqualification Proceeding

On Monday, 26 August 1987, the Government filed a written opposition to attorney Iredale, because "the Government believes multi conflicts of interest preclude the request of substitution of counsel." (JA 38; CR 70:4). The Government objected to Iredale's representation of petitioner while continuing to represent Gomez-Barajas and Bravo, although the latters' pending cases had been resolved with negotiated pleas of guilty that had been accepted by the district court.

The Government contended that Gomez-Barajas might withdraw from the plea of guilty and that petitioner might then become

a "potential witness" against Gomez-Barajas.[9] (JA 39; CR 70:5).

In its opposition the Government also challenged attorney Iredale's joint representation of petitioner and Bravo. (JA 39-41; CR 70:5-6). Bravo and the petitioner were charged in the same conspiracy, and the Government now sought Bravo to testify as to a load of marijuana delivered to a house

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[9] The Government's full written objection as to the alleged petitioner-Gomez-Barajas conflict was: "Initially, it is evident that while Juvenal Gomez-Barajas has entered a plea of guilty, the proceedings against him are, by no way, concluded. Rather, the court has specifically told Juvenal Gomez-Barajas that the recommendation by the Government is not binding on the court. If the court determines not to follow the Government's recommendation, Juvenal Gomez-Barajas would then be permitted to withdraw his plea of guilty and proceed to trial on numerous narcotics, firearms and tax charges. Unquestionably, defendant Mark Erick Wheat is a potential witness at those trials. Were he to be called as a witness, counsel for Gomez-Barajas would, of course, be compelled to impeach his credibility. However, that situation would have to prove awkward for counsel if he was, either at that time or previously, counsel for Mark Wheat. In fact, as counsel for Mark Wheat, it would be virtually impossible for him to properly and ethically represent Wheat in determining under what circumstances Wheat might possibly become a witness." (CR 70:4-5).

controlled by Vidal which was eventually transferred to the petitioner. (JA 40; CR 70:5) The Government might call Bravo as a witness and would recommend more favorable consideration at sentencing.[10] (JA 39-40; CR 70:5-6). To "ensure the effective assistance of all defendants..., and, in order to maintain the public's confidence in the legal profession and to ensure the integrity of judicial proceedings" the Government opposed attorney Iredale's representation of petitioner.[11] (JA 41; CR 70:6)

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[10] The Government would now recommend no time in custody. The original understanding was probation with not more than thirty days confinement as a condition of probation.

[11] The Government's full written objection as to the petitioner-Bravo conflict was: "Additionally, Attorney Iredale currently represents defendant Javier Bravo. As the court is well aware, based on statements made at the change of plea by and on behalf of defendant Javier Bravo, he was definitely a member of the conspiracy alleged in Count One in case number 85-0307. The Government's continued investigation into this case has revealed that a portion of the marijuana delivered by Bravo to the house controlled by Victor Vidal in June of 1982 was eventually transferred to defendant Mark Wheat. Consequently, the Government is

At the hearing on 26 August 1987, the Government contended there was an actual conflict and "the very clear appearance of a conflict" and opposed the entry of attorney Iredale on behalf of petitioner. (JA 69; 1 RT 19). Bravo agreed to testify for the Government and would receive additional leniency[12] (JA 71; 1 RT 20). The prosecutor

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desirous of having Javier Bravo testify at the upcoming trial. Consistent with this desire, the Government has contacted counsel for Javier Bravo and requested that his counsel [client] be made available as a witness. In that regard, the Government has offered to modify its position at the time of sentencing on Javier Bravo in a manner more favorable to him, in exchange for his willingness to testify. Because of the very real likelihood that defendant Javier Bravo may be a Government witness at the trial against defendant Mark Wheat, the existence of a conflict of interest if counsel for Javier Bravo is allowed to represent Mark Wheat becomes clearly apparent and by no means speculative. Consequently, the Government believes the court, in order to ensure the effective assistance of all defendants who have appeared before it during the course of these proceedings and, in order to maintain the public's confidence in the legal profession and to ensure the integrity of the judicial proceedings, the requested substitution of counsel should be denied." (CR 70:5-6).

[12] The arrangement agreed to by Attorney Iredale to allow Bravo to testify for the Government did indeed result in a probationary sentence without any confinement for Bravo. (CR 91).

acknowledged that Bravo would not identify the petitioner; his testimony only corroborated other witnesses, and he would only admit to delivering marijuana to a residence in the San Diego area controlled by Vidal, a portion of which allegedly went to petitioner's house. (JA 71; 1 RT 20). The prosecutor feared that mid-trial the waiver of the supposed conflict would be withdrawn. (JA 72; 1 RT 21).

Counsel for attorney Iredale characterized the issue as right to counsel of one's choice. (JA 73; 1 RT 21). He stated that after the Gomez-Barajas acquittal, petitioner wanted attorney Iredale because the same informants would be testifying in petitioner's trial and attorney Iredale had already successfully cross-examined and impeached them. (JA 73-74; 1 RT 22). Attorney Iredale would make no attempt to impeach Bravo. (JA 75-76; 1 RT 23).

Counsel for attorney Iredale further contended that it was speculative to base a conflict on something not likely to happen, i.e., Bravo changing his testimony when called to testify, and it was too speculative to deny a defendant counsel of his choice. (JA 76-77; 1 RT 23-24). If a potential conflict existed, it was waived. (JA 78; 1 RT 24). The district court recognized that petitioner's case was distinguishable from a conflict with one's own attorney (JA 80; 1 RT 25-26).

Attorney Iredale saw neither an actual nor a potential conflict, but an effort by the Government to manipulate who serves as defense counsel. As to the lack of conflict, attorney Iredale contended that former jeopardy would bar prosecution of the marijuana conspiracy against Gomez-Barajas in the event he withdrew his plea of guilty. There was no allegation in the discovery or the Grand

Jury transcripts that petitioner was involved in any other criminal activities with Gomez-Barajas, i.e., cocaine, firearms, and tax violations. (JA 82-84; 1 RT 27-28). If the unlikely scenario the Government portrayed were to occur -- that Gomez-Barajas would withdraw his plea of guilty and go to trial, attorney Iredale noted: "Mr. Wheat is not even a conceivable witness." (JA 84; 1 RT 28).

Bravo did not know of the petitioner until he appeared in court, and his testimony for the Government would actually be helpful to the petitioner's defense of multiple conspiracy. (JA 85-86; 1 RT 29). Attorney Iredale stated: "I do not intend to use any confidential information or privileged communications to impeach Mr. Bravo." (JA 87; 1 RT 29). Attorney Iredale stated the Government's calling of Bravo was an attempt to manufacture a conflict in order to secure

counsel of its choice. (JA 87; 1 RT 28-29)

The petitioner was willing, if there was an actual or potential conflict, to waive it to have attorney Iredale represent him. (JA 86-87; 1 RT 29). The court accepted the offers of proof that Gomez-Barajas, Bravo, and petitioner who would testify there were no conflicts, and if there were any they would willingly waive them. (JA 110-111; 1 RT 43-44).

Defense counsel had strongly urged the petitioner to use attorney Iredale because of Iredale's successful experience with the Government's witnesses. The previous Thursday he had turned over all his files to attorney Iredale. (JA 88-89; 1 RT 30-31). Attorney Iredale was prepared to try the case and would not ask for "a single minute of continuance." (JA 92; 1 RT 32).

Defense counsel contended that it was a "clear legal advantage" to have attorney

Iredale "on his defense team." (JA 124; 1 RT 52). In response, as to attorney Iredale's proven legal skill as a trial lawyer and petitioner's desire to have him as counsel, the district court stated:

> Were I in [petitioner's] position I'm sure I would want Mr. Iredale representing me, too. He did a fantastic job in that [Gomez-Barajas] trial and I'm sure Mr. Wheat would like to have him representing him (JA 124-125; 1 RT 52).

In response to defense counsel, the court summed up the issue: "What the Government is doing is saying they don't want Mr. Iredale and we should proceed to trial with you." (JA 90; 1 RT 31).

District Court Finding of Disqualification

> I think based upon the representations of the Government in their memorandum that the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists. I don't think it can be waived, and accordingly, Mr. Wheat's request to substitute Mr. Iredale in as attorney of record is

denied.[13] (JA 100-101; 1 RT 37).

Repeated Requests for Attorney Iredale during Trial and References to Gomez-Barajas and Bravo

On the first day of trial before jury selection defense counsel renewed the Motion for Representation by Counsel of Defendant's Choice, adding that defense counsel had previously been told by the prosecutor who the witnesses were going to be and Bravo had not been named. In the alternative to substituting attorney Iredale as counsel, defense counsel requested he be added to the defense team to try the case. The court denied the motions. (1 RT 53-1 - 54).

The chief evidence against the petitioner at trial was the testimony of Vidal, the marijuana overlord who became the Govern-

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[13] The district court recognized there was no Ninth Circuit precedent and erroneously anticipated that defense counsel would immediately seek pretrial review in the Court of Appeals. (1 RT 37-39). Such interlocutory review of this issue was not possible. **Flanagan v. United States**, 465 U.S. 259 (1984).

ment's principal witness. Vidal obtained large quantities of marijuana in Mexico. A total of more than 20 tons came from several named wholesalers, none of whom included Gomez-Barajas.[14] Most of this marijuana was stored on consignment in the petitioner's garage. Vidal inventoried the property kept on the petitioner's premises, and when it was sold the proceeds were turned over to Vidal. (1 RT 201-202.) The credibility of Vidal, who received substantial benefits for his cooperation,[15] was the principal

[14] Over a five-year period Vidal delivered 20 tons. He had received five tons each from Verdugo, Solis, and Galindo, and 1000 pounds from Silva (2 RT 272-4, 295-303).

[15] Vidal was released on bail on federal charges and expected no further incarceration (1 RT 111, 2 RT 263-4). Charges had been dismissed against his spouse (2 RT 265-6). He and his family would be given resident alien status (2 RT 262). Access to the witness protection program would be provided (1 RT 111; 3 RT 470). He had been paid $11,800 for his cooperation, his only income since his arrest (2 RT 263; 3 RT 484). His residence and automobile were exempted from forfeiture (2 RT 266). Vidal had not reported about $250,000 income during the last three years and hoped that he would not be charged or assessed taxes (2 RT 266-267).

issue for the jury.

Bravo did testify at trial that in June 1982 he delivered 15-20 boxes of marijuana to a house[16] on Robinwood street in Bonita, California. This testimony served only to corroborate Vidal's testimony relating to Overt Acts 13 and 14 of the conspiracy (Count One) involving Bravo and others and in no way directly inculpated either petitioner or his co-defendant[17]. (1 RT 121-130, JA 20). The prosecutor knew that Bravo would not be able to identify either the petitioner or his co-defendant on trial (4 RT 731). Neither defense counsel cross-examined Bravo (4 RT 735, 737-8).

Defense counsel contended that Bravo's

[16] Vidal testified that he had been living in this house, but Solis moved him to the Ramada Inn. Solis kept the merchandise there and was renting the house for Vidal. (1 RT 128-9).

[17] Frederico Sanchez-Cretin was jointly tried with petitioner and convicted of two of four counts, but he did not appeal.

testimony was cumulative and "gave credence to the argument made by Mr. Gene Iredale at the motion to change counsel . . . that the only reason Mr. Bravo was called was to keep my client from getting the lawyer he wanted by creating a conflict or attempting to create one where there was none -- and I don't concede that there is even one now." (5 RT 754-755).

Gomez-Barrajas was never called as a witness in petitioner's trial, and the few minor references to him during petitioner's jury trial raised no conflict of interest, either actual or potential.[18] No testimony

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[18] During the trial of petitioner there was a reference to a condominium used by "Juvenal's" mistress (2 RT 218, 242). Vidal testified that he worked for "Juvenal" among others (2 RT 255). Vidal had no interest in the loads of "Juvenal Gomez" (2 RT 257). Vidal had contacted Gomez-Barajas for help in getting out on bail, but Gomez-Barajas was unable to help him (2 RT 289; 3 RT 425). Vidal did not tell a jail acquaintance the marijuana was his and not Juvenal Gomez nor that he did not work for him (2 RT 299-300). Vidal also testified that he was asked to go with "Juvenal" to take an ounce of cocaine to bribe an official in Mexico (2 RT 344). Gomez-Barajas was one of the people Vidal

connected Gomez-Barajas with the petitioner. Because Gomez-Barajas was not named as one of the sources of Vidal's marijuana in this case, there was no need for defense counsel to refer to him.[19] Indeed, the prosecutor

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accused in this case (3 RT 422, 425). On one occasion Gomez-Barajas drove Vidal and Antuna to petitioner's house, which Vidal entered and returned with a shoe box which Vidal placed in the trunk. Vidal told Antuna that the shoe box contained $30,000 (4 RT 655-6, 692-3).

[19] The Court of Appeals in hypothesizing a conflict placed unwarranted reliance on a representation made at oral argument: "At oral argument the assistant United States Attorney said that Wheat's original attorney implied that Gomez-Barajas was much more culpable in the marijuana distribution scheme than Wheat. Because of Iredale's continuing ethical duty to his client, Gomez-Barajas, he would not have been free to make the same implications had he represented Wheat. This argument strongly supports the trial court's actions." (Pet. App. 9). During the trial no such comparison of culpability was made, because the record demonstrates Gomez-Barajas was irrelevant to the issue of petitioner's guilt. At the time petitioner retained attorney Iredale, Gomez-Barajas had been acquitted of the marijuana charges and had entered a plea of guilty with an agreed upon disposition as to the remaining charges. Attorney Iredale was retained to try petitioner's case, and, if a conflict arose at sentencing, petitioner could retain other counsel. After the trial petitioner had to use substitute counsel on the motion for new trial because trial defense counsel may have been a witness because of his secret pretrial meeting with the judge.(JA 7; 6 RT 961-973).

objected to references to Gomez-Barajas because of the danger of reference to his acquittal, and the court ordered defense counsel not to mention what happened in that trial through a question or otherwise because the prosecutor would be able to introduce the guilty pleas of other co-defendants. (2 RT 287-8).

Defense counsel repeatedly asked the court to allow Iredale to take over the case or at least permit him to cross-examine the principal government witnesses as he had done at the former jury trial because no conflict had been shown. (2 RT 230-2, 4 RT 647).

In closing argument defense counsel made no reference to Bravo or Gomez-Barajas. (5 RT 845-900).

SUMMARY OF ARGUMENT

Fifty years of established precedent of this Court protect the Sixth Amendment

right to counsel of choice in a criminal case. For good reason, several defendants in the same or related cases may wish to use the same attorney, especially if the attorney has had prior favorable experience in their case.

The Government failed below to establish any actual conflict arising from attorney Iredale's multiple representation of petitioner at trial and two co-defendants who were awaiting sentence. Multiple representation has a possible conflict, but such representation is not of itself improper. This Court requires a showing of actual conflict with prejudice to advocacy before recognizing a disqualification of counsel under the Sixth Amendment.

The circumstances of this case suggest that the prosecutor created an unreasonable and speculative conflict to avoid facing the attorney who bested him in a prior jury

trial with a co-defendant.

As to any possible or speculative conflict, the petitioner and the two co-defendants to waived it. The district court, relying on the "representations" of the prosecutor, erroneously held that the parties could not make a waiver. Yet this Court has upheld Sixth Amendment waivers of the right to counsel at every stage of a criminal proceeding even when it has worked to the serious disadvantage of an accused. The petitioner was entitled to waive a conflict-free attorney when it was to his obvious advantage.

The prosecutor should not be given near plenary control over who is to be his opposing advocate. The circumstances of this case, with the pretrial questioning of trial defense counsel about his current use of cocaine and heroin which was not disclosed by the court when petitioner sought to use

Iredale, present a case of unfair disqualification.

As a Sixth Amendment minimum, in the absence of a clearly proven actual conflict, a criminal defendant is entitled to select counsel of his choice. Further, where as in this case all affected clients knowingly and intelligently waive their right to counsel with undivided loyalty, disqualification violated the Sixth Amendment.

ARGUMENT

A Defendant in a Criminal Case is Entitled to a Fair Opportunity to Secure Counsel of his Choice under the Sixth Amendment

Over fifty years ago in **Powell v. Alabama**, 287 U.S. 45, 53 (1932), this Court stated:

> It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his

choice.[20]

In **Betts v. Brady**, 316 U.S. 455, 466, 468 (1942) overruled by **Gideon v. Wainwright**, 372 U.S. 335 (1963)(recognizing Sixth Amendment right to appointed counsel in a felony case), this Court explained the adoption of the Sixth Amendment as granting a criminal defendant the right to be heard by counsel and that the contemporary provision of the states made clear that "the language used indicates only that a defendant is not to be denied <u>the privilege of representation by counsel of his choice</u>." (Emphasis added.) See also **House v. Mayo**, 324 U.S. 42, 46

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[20] At a time when the Sixth Amendment was not applicable to the states, this Court recognized that the right to counsel of choice was an issue of fundamental fairness made applicable to the States under the Fourteenth Amendment Due Process Clause:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. 287 U.S. at 69.

(1945)("This was a denial of petitioner's constitutional right to a fair trial, with the aid and assistance of counsel whom he had retained"). See also **Crooker v. California**, 357 U.S. 433, 439 (1958), overruled on other grounds **Miranda v. Arizona**, 384 U.S. 436 (1966).

Chandler v. Fretag, 348 U.S. 3, 9 (1954), again held:

> Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his <u>own</u> counsel was unqualified.[21] (Emphasis added.)

Recently in **Flanagan v. United States**, 465 U.S. 259, 267-268 (1984), this Court reiterated the right to be represented by counsel of one's choice and equated it to the Sixth Amendment right to represent oneself.

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[21] This court also stated: "A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." 348 U.S. 3, 10. Chandler had waived counsel on the issue of his guilt, but had requested the opportunity to get counsel for the habitual criminal accusation.

In an adversary process in which the Government seeks to impose serious criminal sanctions, the defendant with the constitutional right to the assistance of counsel is entitled to the best qualified advocate he can retain. The attorney-client relationship in a combat in which life or liberty is at stake critically needs to be founded on trust, loyalty, and confidence. Our system recognizes and supports this intimate and professional relationship by permitting the defendant, the client, to change attorneys at any time unless found to be a delaying tactic.

The defense is personal to the defendant, not the lawyer. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." **Faretta v. California**, 422 U.S. 806, 819-820 (1975). The defendant must be given reasonable latitude to choose from

available counsel.[22] Many factors may influence the selection of counsel. Probably the most important would be skill and experience, which is a matter of personal reputation or demonstrated track record.[23]

The legal community, following the history of the medical community, has now developed an unlimited array of specialties and subspecialties. It is not just a criminal law practitioner, but either a federal or state specialist. Some attorneys specialize in jury trial work, others in appeals. The

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[22] In **Leis v. Flynt**, 439 U.S. 438 (1979), this court held that out-of-state attorneys in a state criminal case did not have a sufficient property interest to appear pro hac vice. If an attorney was not admitted to practice before the court or was not available, a demand to be represented by such attorney would appear unreasonable.

[23] Eugene Iredale, the lawyer the petitioner hired for the jury trial, has been recognized for his professional excellence as a criminal defense lawyer. See Naifeh & Smith, **The Best Lawyers in America** 406 (1987). In his own community Iredale is recognized as a "super star." (6 RT 978). He has broad trial and appellate experience including two arguments before this Court. **United States v. Valenzuela-Bernal**, 458 U.S. 858 (1982); **United States v. Quinn**, 106 S.Ct. 1623 (1986).

number of specialties is limitless and growing every day as litigation becomes increasingly complex (i.e. U.S. Sentencing Commission Guidelines). Often the client will need an attorney just to help locate the best qualified attorney for a particular case.

Rapport with the attorney is important, because the client has a right to expect the attorney will consider his views in the handling of the case. The lawyer may have the technical skills, but the ultimate outcome of the case will be visited alone on the defendant, who has a valid interest in the conduct and presentation of his case. Another critical consideration will be familiarity with the subject matter and facts of the case.[24]

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[24] At the prior trial Attorney Iredale gained significant experience examining the same witnesses and from having tried the related case. The prosecutor had the same advantage. With the disqualification of Iredale that comparable or offsetting advantage was lost to the petitioner.

Often the controlling consideration in the selection of counsel in our free enterprise society will be the financial resources of the defendant. A defendant charged with a federal felony prosecution can be expected to pay thousands of dollars for legal representation. See **Cuyler v. Sullivan**, 446 U.S. 335, 337 (1980)(third co-defendant unable to pay his own lawyer accepted representation from two attorneys representing two co-defendants). In the face of staggering legal costs that some defendants, often in similar situations with family, friends, and work ties, after careful consideration of the consequences of possible conflicts, should be able to choose a common attorney.

The advantages of using a common attorney by one or more defendants are numerous and well recognized. The defendants in **Flanagan** used the same law firm and founded their defense on common ground in resisting the pro-

secution. The usefulness of this strategy has been restated in **Holloway v. Arkansas**, 435 U.S. 475, 482-483 (1978):

> One principle applicable here emerges from **Glasser** [**v. United States**, 315 U.S. 60 (1942)] without ambiguity. Requiring or permitting a single attorney to represent co-defendants, often referred to as joint representation, is not per se violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants can appropriately be represented by one attorney, indeed, in some cases, certain advantages might accrue from joint representation. In Mr. Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

Another need for using a common attorney arises in a large-scale prosecutions. With many defendants in a single case, the available skilled and experienced criminal practitioners in a community could be depleted if the Government or the court were to insist that each defendant be represented by separate counsel.

The district court must make inquiry

when there is multiple representation of defendants in a federal criminal case to insure the defendant understands the risks, actual or potential, and waives those risks.[25] The court should not imprison the defendant's choice of counsel under the guise that it is in his best interest to avoid a conflict.[26]

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[25] Fed. R. Crim. Proc. 44(c) addresses this concern. The language of the Rule 44(c) advises inquiry by the judge to insure that the choice of the defendant is free, voluntary, and knowingly and understandingly made.

[26] This principle was announced in **Adams v. United States ex rel. McCann**, 317 U.S. 269, 279-280 (1942) and restated in **Faretta**:

> ". . . What were contrived as protections for the accused should not be turned into fetters . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.
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> ". . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution." 422 U.S. at 815 (emphasis added).

Such an Orwellian construction of the right to counsel defies the principle that a defendant ordinarily knows what is in his best interest. It also creates the appearance and reality that the disqualification of the desired defense counsel is to give the Government some advantage. The Sixth Amendment right to the assistance of counsel should leave the defendant free to choose a particular advocate.[27]

The Government Established No Conflict of Interest That Justified Disqualification

In **Dukes v. Warden**, 406 U.S. 250 (1972), an attorney represented Dukes who pleaded guilty and also two co-defendants who cited

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27 Such motions brought by prosecutors may be an attempt "simply to gain the disqualification of talented defense counsel in order to make the prosecution easier." Burkoff, **Criminal Defense Ethics: Law and Liability** 7-20 (1987). **See** also Margolin & Coliver, **Disqualifying Defense Counsel**, 20 Am. Crim. L. Rev. 227, 229 (1982): "If the government's disqualification challenge succeeds, the best qualified lawyers ... may be removed from the case." With unlimited discretionary disqualification the prosecutor may defeat the defendant's choice of counsel.

their cooperation in bringing about the plea of guilty of the other at their sentencing. At the time he entered the plea of guilty, Dukes was satisfied with this attorney. This Court did not permit the withdrawal of the guilty plea because of the alleged disloyalty or conflict of interest.

In **Cuyler v. Sullivan**, 446 U.S. 335 (1980), two retained lawyers represented three defendants charged in a state murder case. The Court found multiple representation. 446 U.S. at 342. Sullivan was tried first and convicted, but the other two defendants in separate jury trials were acquitted. On federal habeas corpus, the federal court of appeals reversed the denial of the district court, because it held that a possible conflict was sufficient to violate Sullivan's Sixth Amendment rights. This Court reversed and held:

> 1. **Holloway** reaffirmed that multiple representation does not violate the Sixth

Amendment unless it gives rise to a conflict of interest. 446 U.S. at 348.

2. There is not an automatic presumption of conflict when an attorney represents more than one defendant, because '[s]uch a presumption would preclude multiple representation even in cases where [a] common defense . . . gives strength against a common attack.' 446 U.S. at 348.

3. In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. 446 U.S. at 348. (Emphasis added.)

4. Absent special circumstances, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. 446 U.S. at 346-347. (Emphasis added.)

5. An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial. 446 U.S. at 347 (citing **Holloway**).

6. The provision of separate trials for Sullivan and his codefendants significantly reduced the potential for a divergence in their interests. 446 U.S. at 347.[28]

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[28] This factor applied here, because only petitioner was facing trial. The Court of Appeals refused to recognize this distinction: "We see no reason to distin-

Applying these principles, it is apparent that the Sixth Amendment right to counsel encompasses a right to multiple representation absent an actual conflict. [29] There was no actual conflict in this case.

The district court recognized that this case did not present a conflict between a criminal defendant and his attorney.[30] (JA 80; 1 RT 25-26). No conflict or claim of disclosure of confidential communications was

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guish between the successive and simultaneous representation cases on courts' power to override codefendants' waivers, as the rationale and policies are virtually identical." (Pet. App. A10 n. 3) The court of appeals failed to note the additional consideration that the cases of the two codefendants were resolved except for sentencing.

[29] See also **Strickland v. Washington**, 466 U.S. 668, 692 (1984).(restating the **Cuyler** requirement for actual conflict).

[30] See **In re Grand Jury Subpoena Served upon Doe**, 781 F.2d 238 (2d Cir. 1986)(en banc)(conflict arose between attorney and client when defendant challenged grand jury subpoena of records from his attorney); **United States v. Krebs**, 788 F.2d 1166 (6th Cir. 1986) (conflict with attorney suspected of same criminal involvement, but conflict could be waived).

made by any former or present client.[31]

The petitioner retained the attorney who the trial judge said had done a "fantastic job" in the prior jury trial involving Vidal and two other informants who the Government would use in his jury trial. It was clearly to his advantage to have attorney Iredale who had been successful against the same

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[31] Even if such claims are made, disqualification should not be automatic. If prosecutors were able to get any of their witnesses to assert any potential conflicts to disqualify excellent defense advocates who may have represented the witness in the past, it could have far reaching consequences on defender offices with large clienteles. Cuyler's standard of actual conflict for disqualification lessens such attacks. Trial courts should still have flexibility to fashion a remedy short of disqualification. In **United States v. Agosto**, 675 F.2d 965, 973 (8th Cir. 1982), the court held: "Assuming that after further inquiry the district court is satisfied that a clear showing has been made that the interests of defendants Bruins and Newstrum are adverse to the interest of Gustafson, we instruct the district court to consider whether there exists a means of eliminating the potential conflict less burdensome than disqualification." Another court required an in limine disqualification hearing by the trial judge "who must weigh the probative value of the information the government seeks [before the grand jury] against the loss of counsel of accused's choice." **In re Grand Jury Subpoena Served upon Doe**, 781 F.2d 238, 250 (2d Cir. 1986).

witness and prosecutor before the same judge. Both attorney Iredale and defense counsel who represented petitioner at trial repeatedly stated there was no conflict. The petitioner, Gomez-Barajas, and Bravo all accepted such risk of conflict as may exist. Should not the opinion of the three parties and the two attorneys who represented them be given paramount consideration? The district court erroneously gave paramount consideration to the mere "representations" of the prosecutor.

The trial itself revealed the accuracy of defense counsel's predictions demonstrating that the defendants and defense counsel are in the best position to ascertain conflicts and confirming that great deference should be given to their analysis of the conflicts problems. The few unrelated references during petitioner's trial to Gomez-Barajas would not have compromised Iredale.

The prosecutor's fanciful speculation that the judge who heard the jury trial and accepted the guilty plea of Gomez-Barajas on the remaining charges with an agreed disposition (Fed. R. Crim. Proc. 11(e)(1)(C)) might refuse the agreed disposition was unrealistic at best. The claim that the ensuing trial might result in petitioner being called as a witness against Gomez-Barajas on tax evasion and smuggling merchandise charges did not rise to the level of a remote possibility. Such "locked in" plea agreements are rarely set aside, for the experienced trial judge wishing to reserve greater discretion at sentencing will not ordinarily make such agreements, choosing instead to merely consider the prosecutor's recommendation at sentencing (Fed. R. Crim. Proc. 11(e)(1)(B)).[32] After the

[32] The judge reserved such sentencing discretion as to Bravo who testified at petitioner's trial. When Bravo entered his plea, the prosecutor was recommending the Youth Act probation with up to 30 days confinement but not to interfere with Bravo's job. Judge Irving

judge had heard the trial, witnessed the fantastic job of Iredale, and knew both prosecutor and defense agreed to this disposition to end the matter against Gomez-Barajas, it is incredible to expect that under these circumstances he would not sentence in accordance with the agreement. And, of course, the judge ultimately did just that. That is but the first stage of this disingenuous scenario.

If the judge wanted to impose a sentence of greater than 365 days, Gomez-Barajas could have accepted it. The Government's strained hypothetical required that Gomez-Barajas go on trial and the petitioner to be called as a witness. These supposed future events are further conditioned on an assumption that Iredale would be representing both petitioner and Gomez-Barajas at the

was free to impose the maximum, 15 years (JA 47-52; 1 RT 5-7), but, in fact, followed the recommendation and granted straight probation (JA 11).

new trial. If these series of unlikely events were to occur, both petitioner and Gomez-Barajas would still be able to hire other counsel. Both petitioner and Gomez-Barajas assumed these highly speculative risks, and petitioner had the compelling need for the exceptional and experienced services of Iredale for his jury trial which was about to commence. The speculative concerns of the prosecutor, under the guise he was protecting petitioner's right to counsel, should not defeat the very real advantages of attorney Iredale to petitioner.

The Government's calling of Bravo in the trial of petitioner was nothing more than a veiled attempt "to engineer a conflict" (JA 67; 1 RT 17) to avoid facing Iredale in another jury trial. On the day of Bravo's plea, the Government thought it had reached a "disposition," but in the event of a jury trial, "[t]he government has not specifically

made any plans to call him (Bravo) as a witness but that is, of course, always a potential" (JA ; 1 RT 12-13). Defense counsel in advance of trial had been told who the Government witnesses would be and Bravo was not one of them. (1 RT 53-1). The prosecutor knew that Bravo would not identify petitioner. Bravo testified to a marijuana delivery to Vidal's house in which the petitioner was not involved, and neither defense counsel cross-examined him. No mention of Bravo is made in defense counsel's argument. The prosecution introduced this witness solely to avoid facing Iredale in the jury trial, and this observation was reiterated by defense counsel after Bravo had testified. (See p. 24, above).

Both attorney Iredale and trial defense counsel found no conflict. Cuyler held that the attorney representing multiple clients is in the best position to determine whether

a conflict exists or will develop. 446 U.S. at 347. In **Burger v. Kemp**, 107 S.Ct. 3114, 3120 (1987), this Court stated:

> Moreover, we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client. Trial courts appropriately and 'necessarily rely in large measure upon the good faith and good judgment of defense counsel.'

Petitioner had the additional advantage of independent counsel, trial defense counsel whom he originally retained, to provide a separate and objective view that no conflict existed.

This was not the usual situation where multiple defendants are represented by a single attorney from the outset, for in such circumstances it may be advantageous to have separate counsel become familiar with the case and advise the defendant of the potential risks from the conflict. Petitioner had a second independent opinion from counsel familiar with the case. The

district judge chose to accept without any hearing, factual basis of the alleged conflicts, or exploration of possible cures short of disqualification. The district court summarily accepted the "representations" of the prosecutor over the professional opinions of two separate defense counsel.

The district court made no factual findings about the conflicts. The district court relied upon the prosecutorial "representations" about Gomez-Barajas and Bravo and found an "irreconcilable conflict." The Government never satisfied any burden of showing an actual or potential conflict. The highly speculative and unreasonable allegations of conflict by the prosecutor were without foundation and little more than a vehicle to avoid facing a successful advocate. The district court was induced by the prosecution to adopt the "irrefutable

presumption doctrine"[33] for disqualification of counsel. This automatic disqualification doctrine for possible conflict was expressly rejected in Cuyler, 466 U.S. at 348.

Noticeably, no prosecutorial objection was raised as to attorney Iredale's representation of Gomez-Barajas and Bravo in the same case when there was no chance this prosecutor would have to again face Iredale in a trial. Bravo pleaded guilty. The prosecutor only objected to Iredale when the "very high likelihood of a disposition" dissipated and another battle with Iredale became eminent. The prosecution did not wish to face in a jury trial the more aggressive and demonstrably successful advocate.

The Sixth Amendment right to counsel is

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[33] The irrefutable presumption doctrine was developed in federal civil cases to protect the attorney-client privilege. The doctrine is not applicable unless there are adverse interests and is not applicable if no confidential communications were made. United States v. Agosto, 675 F.2d 965, 971-972 (8th Cir. 1982).

for the protection of the defendant.[34] That protection includes a reasonable opportunity to employ counsel of choice. At the very least, in the absence of a demonstration of actual conflict, a defendant's choice of counsel must be respected as long as he and other affected defendants or witnesses waive their right to counsel with undivided loyalty. In the context of this case, the Government abrogated that right without justification.[35]

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[34] Fed. R. Crim. Proc. 44(c) by its express language is designed to protect the defendant's right to counsel. In a federal court, the judge is required to make inquiry. This rule, which exists as the result of the supervisory power of this Court's and Congress' role in rule-making for inferior federal courts (18 U.S.C. 3771) should supplement the Sixth Amendment right to counsel of choice and not distort it. The rule should not be interpreted to conflict with established precedent so as to give power to the district judge to defeat the right of counsel under the guise of protecting it. Such reasoning is reminiscent of the Inquisition's treatment of heretics: Burn the body, save the soul.

[35] If the prosecutor has such near plenary power to disqualify, the defense counsel representing multiple defendants will have to placate the prosecutor to serve more than one client. If the defense attorney has to give something to the prosecution to remain in a case, there would be a far greater disloyalty to the clients he represents.

In a Criminal Case the Defendant has the Right to Waive Potential or Possible Conflicts

In **Glasser** a conflict existed, and the court granted relief only to the defendant who did not make an adequate waiver.[36] Every aspect of the right to the assistance of counsel in a criminal case may be waived from custodial interrogation through appeal. The waiver must be voluntary and knowingly and intelligently made. **Johnson v. Zerbst**, 304 U.S. 458, 464 (1938); **Edwards v. Arizona**, 451 U.S. 477, 482 (1981). A criminal defendant may waive counsel completely and represent himself (**Faretta v. California**, 422 U.S. 806 (1975)). It follows that he can be represented by an attorney apparently or actual-

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[36] **Glasser** might be better characterized as a case protecting the right to choice of counsel. When the trial court inquired about appointing Glasser's attorney for the co-defendant Kretske, Glasser said, "I would like to have my own lawyer representing me." 360 U.S. 15, 69. This Court found no waiver by Glasser and reversed his conviction, but affirmed the conviction of Kretske who accepted the appointment. 360 U.S. at 69, 87-88.

ly burdened with an actual or potential conflict.

Gomez-Barajas and Bravo, the co-defendants whose proceedings had been practically terminated, waived any objection to Iredale representing the petitioner. Petitioner also waived any conflict. The district court found that a waiver of the alleged conflict could not be made. The court of appeals ruled that the district court had discretion to refuse such waivers and that it would scrutinize the disqualification ruling only for abuse of discretion.[37]

This Court in **Holloway** held, "a defendant may waive his right to the assistance of an

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[37] One court of appeals (divided 2-1) permitted a disqualification in an attorney-client conflict, but ruled that the abuse of discretion standard of review was too lax: "We believe in criminal cases, where the defendant's sixth amendment right to counsel is implicated, the conflict in our prior cases should be resolved in favor of the accused. The 'abuse of discretion' standard is simply too deferential where such a fundamental constitutional right is affected." **United States v. Hobson**, 672 F.2d 825, 827 (11th Cir. 1982).

attorney unhindered by a conflict of interest." 435 U.S. 475, 483 n.5. In **Cuyler**, Justice Brennan, concurring, recognized the defendant in a criminal case could make a knowing and intelligent choice of joint representation (446 U.S. at 353), and Justice Marshall, concurring and dissenting, wanted the trial judge to make a preliminary determination that the joint representation is the product of the defendants' informed choice (446 U.S. at 354). **Cuyler** and its progeny establish that the defendant is capable of waiving at least a potential conflict.

In **Burger v. Kemp**, 107 S.Ct. 3114, 3120 (1987), this court revisited **Holloway** and **Cuyler** in the context of multiple representation in a capital case. This Court recognized that the asserted actual conflict, even if it had been established, did not harm the defense lawyer's advocacy. 107 S.Ct. at

3121. The prosecution's manufactured potential conflicts in the petitioner's case did not approach the seriousness or the reality of the conflict in **Burger**. Consistency dictates that a defendant should be able to waive the speculative conflicts of the type suggested here by the prosecution.

All the standards for professional performance permit counsel to represent multiple clients if all the clients make an informed consent.[38] These standards should not be construed to defeat constitutional rights (Cf. **Bates v. State Bar of Arizona**, 433

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[38] ABA Model Rules of Professional Conduct, Rules 1.7, 1.8(g); ABA Model Code of Professional Responsibility, DR 5-105(A); American College of Trial Lawyers, Code of Trial Conduct, Rule 6(c). The American Trial Lawyers Association's The American Lawyer's Code of Conduct states it succinctly:

> 2.4 A lawyer may serve one or more clients, despite a divided loyalty, if each client who is or may be adversely affected by the divided loyalty is fully informed of the actual or potential adverse effects, and voluntarily consents. Burkoff, **Criminal Defense Ethics: Law and Liability** App C-5 (1987).

U.S. 350 (1977)(First Amendment overrode state bar ethical prohibition of attorney advertising)) when a plain reading permits the client to select a lawyer burdened with a conflict.

On so critical an issue as the right to choose a defense lawyer in a criminal case, the defendant's choice, facilitated by a waiver, must be respected by a system that honors due process, fairness, and individual choice. The Sixth Amendment right to counsel in so many cases is lost to the disadvantage of the criminally accused by waiver, that this Court, having clearly established the validity of the waiver, must respect that waiver when the petitioner seeks it to his advantage in implementing his right under the Sixth Amendment.[39]

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[39] In **United States v. Curcio**, 680 F.2d 881, 888-889 (2d Cir. 1982), the court paraphrased **Faretta**:

> If the defendant reveals that he is aware of and understands the various risks and pitfalls,

Additional Reasons Why the Disqualification Was Improper

In this case there are three additional reasons why Iredale should not have been disqualified: (1) the nature and need for counsel, (2) the timeliness of the request, and (3) public confidence in the adversarial system in criminal cases.

Defense counsel repeatedly asked for Iredale, and if the court would not permit him as sole counsel, then defense counsel asked that he serve as co-counsel or be allowed to question certain witnesses. Three months earlier the trial judge in a secret meeting questioned defense counsel, not attorney Iredale, about current drug usage,

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> and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally, . . . that he nevertheless chooses to hazard those dangers, we would regard his waiver as knowing and intelligent and allow his choice to "be honored out of that respect for the individual which is the lifeblood of the law."

but this patent conflict of interest,[40] the attorney's concern about himself, was never disclosed when the petitioner wanted and needed Attorney Iredale. The court should have been more sensitive to the request of compromised defense counsel to be replaced.

The request for Iredale was made when he was ethically available -- after he had arranged favorable dispositions for his other two clients. Consistent with **Cuyler** that the conflict is less if the parties are not tried together, attorney Iredale did not agree to represent the petitioner and Bravo in the same jury trial, but Iredale first

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[40] The conflict of the defense counsel as a person suspected of a serious criminal violation made him a potential accused. If the court notified the prosecutor, his conduct could be investigated, for neither the court nor a prosecutor were bound to accept his self-serving denials. Defense counsel's loyalty to his client was compromised, and the petitioner was not aware of it until after the trial. This Court has before it enough to reverse petitioner's conviction because of this actual conflict which undermined the all-out loyalty owed to the client. Cf. **Wood v. Georgia**, 450 U.S.261 (1981)

resolved Bravo's case on a very favorable basis.

Attorney Iredale as well as petitioner's defense counsel had no notice that Bravo would be involved in petitioner's trial. Repeatedly Iredale stated that Bravo had no information about petitioner and counseled Bravo to testify in petitioner's trial so as to receive the additional leniency (i.e., straight probation without a condition of up to 30 days confinement). Bravo and petitioner were aware that Bravo would testify, and they accurately knew there would be no conflict between them. Likewise, Iredale did not agree to represent petitioner until he has a "locked-in" disposition for Gomez-Barajas.

Attorney Iredale, sensitive to the ethical problems, exercised caution and restraint to avoid actual as well as potential conflicts consistent with the highest traditions of

the bar. At the first opportunity he made known to the court his being retained after he had resolved his professional obligations to both Gomez-Barajas and Bravo. As the court saw no objection to his joint representation of Gomez-Barajas and Bravo, the court had no objection to his representation of petitioner unless the prosecutor had an objection.

The prosecutor was given from Thursday (22 Aug 85) to Monday (26 Aug 85) to prepare his opposition, which he did on Monday, and the court relying on the prosecutor's representations disqualified Iredale, who had used the intervening weekend to prepare for trial. The court conducted no inquiry of the petitioner or the defendants as to the possible conflicts. Such an inquiry could have been conducted in less than an hour.

Attorney Iredale requested no time to prepare and was ready to go to jury trial the

following day.[41] In fact, Iredale would have gone to trial sooner than trial defense counsel, who asked for and received additional time because he was not prepared to go forward as scheduled.[42]

Public confidence will not be enhanced by a prosecutor using the judicial system - under the guise of protecting a defendant's rights -- to deny him the right to counsel of his choice in a criminal case.[43]

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[41] This case must be distinguished from those cases where the request for different counsel is accompanied by a request for continuance. Such requests are generally disfavored because of their improper use as a delaying tactic. That factor is not present in this case, and the issue is solely the right to counsel of one's choice.

[42] Although Iredale was hired for the trial, we will never know what plea bargaining might have taken place if the petitioner was able to keep him as his attorney. Iredale, who obtained an acquittal in the related case involving the same witnesses, would clearly have been able to more effectively bargain for petitioner.

[43] In **United States v. Washington**, 797 F.2d 1466, 1467 (9th Cir. 1987), the court stated:

> We have grave doubts whether an appearance of impropriety would ever create a sufficiently serious threat to public confidence in the

The prosecutor had been previously bested in a jury trial involving the same principal witness, and now the defense lawyer who bested him is removed at the prosecutor's request. The speculative basis of the prosecutor's request, adopted by the court, demonstrates no real conflict, but a conveniently imagined one. Fair play in a democratic society should allow a criminal defendant to obtain the best advocate he can retain. In summary, it should never appear, as it does here, that a defense lawyer

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integrity of the judicial process to justify overriding the Sixth Amendment rights. It is easy to express vague concerns about public confidence in the integrity of the judicial process. It is quite a different matter to demonstrate that public confidence will be undermined if criminal defendants are permitted to retain lawyers who worked for the government in the field of law implicated by an indictment. We are unwilling to sacrifice a defendant's Sixth Amendment right to counsel of his choice on such an unsubstantiated premise. Indeed, for all we as judges know in a vacuum, the public very well may have greater confidence in the integrity of the judicial process assured that a criminal defendant's right to counsel of his choice will not be lightly denied.

is disqualified simply because he is "too good."

Disqualification of Counsel of Choice Requires Reversal without a Showing of Prejudice

As this Court unanimously held in **Flanagan v. United States**, 465 U.S. 259, 267-268 (1975):

> Petitioners correctly concede that postconviction review of a disqualification order is fully effective to the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself. **See Faretta v. California**, 422 U.S. 806 (1975). Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. **See McKaskle v. Wiggins**, 465 U.S. 168, 177-178, n.8 (1984). Similarly, postconviction review is concededly effective to the extent that petitioners' asserted right is like the Sixth Amendment rights violated when a trial court denies appointment of counsel altogether, **see Gideon v. Wainwright**, 372 U.S. 335 (1963), or denies counsel's request to be replaced because of a conflict of interest, **see Holloway v. Arkansas**, 435 U.S. 475 (1978). No showing of prejudice need be made to obtain reversal in these circumstances

because prejudice to the defense is presumed.

Although the district court was amenable to a pretrial appeal as to his disqualification order, such relief was not available. The disqualification having been shown to be improper, this Court, for the reasons stated in **Flanagan**, must reverse to implement the right to counsel of choice.

CONCLUSION

This Court, in the absence of a clearly proven actual conflict, must enforce the petitioner's right to counsel of choice when all parties waived the alleged speculative conflict. For the reasons set forth previously and here, this Court is requested to reverse the judgment of the court below.

Respectfully submitted,

DATED: 19 Nov 87

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-4

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARK ERICK WHEAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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50 pp

QUESTION PRESENTED

Whether the district court properly declined to permit the substitution of counsel shortly before trial, where the new lawyer already represented two other defendants charged with the same offenses and where one of the new lawyer's clients was expected to testify for the government.

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Developments in the Law, *Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981) 20, 30
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Standards Relating to the Defense Function § 3.5(b) (1980) 23, 32

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-4

MARK ERICK WHEAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 813 F 2d 1399.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1987. A petition for rehearing was denied on June 3, 1987. The petition for a writ of certiorari was filed on June 29, 1987, and was granted, limited to the first question presented, on October 5, 1987 (J.A. 126). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The relevant portions of the Sixth Amendment to the Constitution and Rule 44 of the Federal Rules of Criminal Procedure are set forth at page 3 of petitioner's brief.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to possess more than 1,000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and five counts of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to ten years' imprisonment and a $125,000 fine. The court of appeals affirmed (Pet. App. 1-14).

1. The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner was part of a large-scale marijuana distribution scheme. From September 1981 through June 1984, petitioner received and stored some 12 tons of marijuana at his home. Most of the individual shipments exceeded one ton. Petitioner then distributed that marijuana to the conspirators' customers. Victor Vidal, who was a key government witness at petitioner's trial, was petitioner's immediate supplier. Vidal worked for co-defendant Juvenal Gomez-Barajas and others. Tr. 115-122, 127-134.

On the Thursday before the scheduled Tuesday trial date, co-defendant Javier Bravo pleaded guilty to the conspiracy charge. Bravo was represented

[1] Petitioner was acquitted on one additional substantive count, as well as on a charge of conspiring to import marijuana (21 U.S.C. 963).

throughout the proceedings by attorney Eugene Iredale. At Bravo's guilty plea proceeding, and immediately after Bravo entered his plea, Iredale moved to substitute himself as petitioner's lawyer in place of petitioner's retained counsel. In the alternative, Iredale moved to add himself to petitioner's defense team. Neither petitioner nor his attorney was present at Bravo's guilty plea proceeding. Iredale stated, however, that petitioner wanted Iredale to represent him and that Bravo would not object if Iredale also represented petitioner. J.A. 57-58.

The prosecutor expressed concern that Iredale already represented not only Bravo, but also Gomez-Barajas. Gomez-Barajas had been acquitted on the conspiracy charge in a separate trial but had entered a guilty plea to other related charges, and both Gomez-Barajas and Bravo were awaiting sentencing. The prosecutor pointed out that in the course of Gomez-Barajas's trial on the conspiracy charge, Iredale had repeatedly referred to petitioner during his cross-examination of government witness Victor Vidal. In addition, the prosecutor stated that although the matter was not settled, because Bravo had just pleaded guilty, there was a possibility that Bravo would be called as a government witness at trial. The district court set a hearing on the substitution motion for the following Monday, the day before trial. J.A. 58-63.

At the hearing, the government objected to the proposed substitution of counsel. The prosecutor pointed out that over the weekend co-defendant Bravo had agreed to testify for the government at petitioner's trial and that he would provide evidence adverse to petitioner. The prosecutor also said that the government's position was that Gomez-Barajas

was petitioner's ultimate supplier of marijuana, and that attorney Iredale's joint representation of both defendants would inevitably result in a serious conflict of interest on Iredale's part. Iredale represented to the court that all three defendants would waive any conflicts of interest arising from his representation of petitioner. The district court concluded, however, that there would be an irreconcilable conflict of interest facing any attorney who attempted simultaneously to represent Bravo, Gomez-Barajas, and petitioner. The court therefore denied the substitution motion, but granted a three-day continuance to petitioner's retained attorney. J.A. 98-112.[2]

2. The court of appeals affirmed petitioner's convictions (Pet. App. 1-14). With respect to the issue before this Court, the court of appeals held that the district court did not abuse its discretion in declining to allow the substitution or addition of Iredale as trial counsel for petitioner. The court explained that a defendant's right to counsel of his choice is "qualified by the need to avoid undermining public confidence in the integrity of the legal system" (*id.* at 6). In this case, the court of appeals stated, the district court "was put in the position of balancing * * * two concerns—the right to representation free of conflicts of interest, and the right to representation of one's choice—knowing that denial of either of these would result in an appeal assigning the ruling as reversible error" (*id.* at 7).

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[2] Petitioner's retained attorney pointed out to the court that petitioner had not complained about the quality of his representation. Rather, counsel had himself advised his client to make the substitution, because he thought it was advisable to have Iredale's assistance. J.A. 124.

The court of appeals concluded that in the circumstances of this case, the trial court "justifiably deferred to strong sixth amendment interests in guarding against potential conflicts that were likely to develop" (Pet. App. 7). The court noted that it was undisputed that Iredale had received privileged information from co-defendants Bravo and Gomez-Barajas that could have been misused in defending petitioner. Furthermore, the court observed, since Bravo and Gomez-Barajas had not yet been sentenced, Irelade "could have received privileged information from [petitioner] that could have been misused in later representations of Gomez-Barajas and Bravo." *Id.* at 8. The court of appeals also pointed out that Iredale would not have been free to make arguments as to the relative culpability of the three defendants at sentencing or before the jury in petitioner's case. Since the interests of the three co-defendants were so plainly adverse, the court rejected petitioner's claim that the conflict of interest facing Iredale was speculative. Instead, the court found that there was a "significant potential" for misuse of privileged information that made the proposed triple representation improper. *Id.* at 8-9.

The court of appeals held that even though Iredale stated that all three of his clients would waive their right to conflict-free counsel, the district court was not compelled to permit Iredale to represent petitioner. The court observed that district courts must have "some discretion" to override waivers of the right to conflict-free representation, both because "defendants may not be able to appreciate the significance of a waiver in light of potential conflicts," and because of the risk of "possible manipulation of testimony resulting from agreements between var-

ious clients, lawyers, and possible third persons not before the court" (Pet. App. 9-10). Since the potential for an actual conflict of interest during Iredale's representation of petitioner was "very likely," the court of appeals held that the district court did not abuse its discretion in declining to allow the substitution of Iredale as petitioner's lawyer on the eve of trial (*id.* at 10-11).

SUMMARY OF ARGUMENT

The Sixth Amendment does not guarantee a defendant the right to the services of a particular lawyer. Rather, the Assistance of Counsel Clause is satisfied as long as a defendant receives the effective assistance of some attorney. To the extent that the Constitution grants a defendant the right to demand representation by a specific attorney, it is the Due Process Clause, not the Sixth Amendment, that provides it. But whatever the foundation for petitioner's claimed right to counsel of his choice, that right is not absolute. At most, the Constitution proscribes only arbitrary or unreasonable interference with a defendant's selection of counsel.

The decisions of this Court demonstrate that a defendant does not have an unqualified right to the counsel of his choice. For example, a trial court may deny a continuance even when such a course of action will interfere with a defendant's desire to be represented by a particular attorney. Similarly, a defendant has no absolute right to insist on being represented by a lawyer who is not admitted to practice before the court that is conducting his trial or hearing his appeal, and a defendant has no right to be represented by a layman. A defendant also may not insist on retaining an attorney who has

represented parties who object to the new representation and who have interests that would be compromised by that representation. To this list of qualifications on a defendant's right to select counsel of his choice, the courts of appeals have added another: that a defendant may not insist upon the services of a particular lawyer where such representation would be contrary to established norms of professional legal conduct or would otherwise undermine the integrity of the trial process.

While there is no flat prohibition against multiple representation of defendants in criminal cases, this Court has recognized for decades the evils inherent in multiple representation. There have been some calls for a complete ban on multiple representation in criminal cases, but prevailing ethical standards for lawyers have not gone that far. They do, however, prohibit multiple representation unless it is obvious that the lawyer can adequately represent the interest of each client and it is clear that no conflict is likely to develop in the course of the multiple representation.

The district court and the court of appeals correctly concluded that attorney Iredale's representation of petitioner was very likely to result in a conflict of interest. One of Iredale's clients, Javier Bravo, was expected to testify against petitioner, and he ultimately did so. Another, Juvenal Gomez-Barajas, was petitioner's superior in the marijuana conspiracy. Under these circumstances, the conflicts inherent in Iredale's joint representation of petitioner, Gomez-Barajas, and Bravo were more than merely speculative, and the court's disqualification order was fully justified. The fact that a defendant's waiver of the right to conflict-free counsel might be

effective to bar a subsequent ineffective assistance of counsel claim does not establish an affirmative right on the defendant's part to insist that the trial court accept counsel who is laboring under a conflict of interest or who faces a high likelihood that a conflict of interest will develop at trial. While petitioner may be willing to give up his own right to conflict-free counsel, he cannot "waive" the independent public interest in the fairness of criminal trials and the integrity of the legal profession.

ARGUMENT

THE DISTRICT COURT PROPERLY DETERMINED THAT PETITIONER WAS NOT ENTITLED TO SUBSTITUTION OF COUNSEL

Petitioner claims (Br. 52-56) that the Sixth Amendment guarantees a defendant the right to the attorney of his choice, even when that attorney already represents another defendant involved in the same case, and even when a court finds that the multiple representation would likely result in an irreconcilable conflict of interest. Multiple representation can be barred, petitioner contends, only if one client-defendant refuses to waive his objection to the attorney's simultaneous or successive representation of the others.[3] The Constitution, however, does not unconditionally guarantee a defendant the right to be represented by the lawyer of his choice, nor does it immunize from judicial scrutiny the decision by several defendants to be represented by the same lawyer. To the extent that any right to counsel of choice exists, the right is not absolute, but rather is subject to a variety of reasonable restrictions. One of the most basic of those restrictions is that a defendant cannot retain a particular attorney when doing so would be contrary to the settled ethical standards that govern the practice of attorneys before United States courts or would otherwise undermine the fairness and integrity of the trial process.

Two threshold observations are necessary to put in context petitioner's claim that he has a constitutional right to insist upon the services of a particular lawyer. First, we do not suggest a rule that would interfere with the principle that criminal defendants ordinarily may retain any attorney they choose from among the universe of attorneys who are members in good standing of the bar of the court in which the defendant is to be tried. Rather, the issue presented here is whether that universe may be slightly constricted by eliminating those few attorneys or firms who cannot accept the representation without violating widely recognized ethical standards for the practice of law. Second, in contrast to other rights of criminal defendants assertable and enforceable

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[3] Petitioner appears to argue that a court may not disqualify counsel even in the face of an actual conflict of interest, as long as waivers have been obtained from the defendant and the other affected parties (Br. 29, 56). At other points, however, petitioner appears to make the more limited argument that a district court may not disqualify counsel when there is only a potential, possible, or "speculative" conflict of interest (see Br. 27, 29, 52). Because disqualification decisions have to be made in advance of trial, and often on the basis of limited information about the defense theory of the case, we believe it makes little sense to attempt to distinguish between "actual" and "potential" conflicts of interest. If, in the court's assessment, there is a substantial likelihood that an irreconcilable conflict of interest will develop at trial, disqualification should be permissible regardless of whether the court concludes that the conflict has become "actual" at the time the court is required to rule.

directly against the government, the defendant's retention of a particular lawyer depends on that lawyer's willingness to undertake the representation—something neither the court nor the prosecution can compel. Thus, the "right" to be represented by an attorney burdened with an actual or potential conflict of interest is entirely dependent upon the attorney's willingness to undertake such professionally questionable representation—something we believe most attorneys would be unwilling to do. It is against that background that the alleged infringement of petitioner's interest in representation by counsel of his choice must be evaluated.

A. The Sixth Amendment Does Not Protect A Defendant's Decision To Engage A Particular Lawyer

Petitioner asserts (Pet. Br. 26-27) that "[f]ifty years of established precedent of this Court protect the Sixth Amendment right to counsel of choice in a criminal case." Petitioner is wrong. This Court has never held that the Assistance of Counsel Clause guarantees the right, absolute or otherwise, to engage the services of a particular lawyer.[4]

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[4] A number of courts of appeals have suggested, without significant analysis, that the Sixth Amendment provides some protection for a defendant's choice of counsel. But those courts have also recognized that any right to counsel of choice is necessarily limited, and the decisions themselves rest upon an overly expansive interpretation of the Assistance of Counsel Clause. See, *e.g.*, *United States* v. *Agosto*, 675 F.2d 965, 969 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *Linton* v. *Perini*, 656 F.2d 207, 209-211 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *United States* v. *Laura*, 607 F.2d 52, 56-57 (3d Cir. 1979); *United States* v. *Burton*, 584 F.2d 485, 490 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979); *United States* v. *Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976) (en banc), cert. denied, 429 U.S. 1104 (1977); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976); *United States* v. *Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975); *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974).

The Sixth Amendment ensures an accused "the Assistance of Counsel for his defence"; it does not suggest that the defendant is entitled to the attorney of his choice. Moreover, the purpose of the Sixth Amendment right to the assistance of counsel "is simply to ensure that criminal defendants receive a fair trial." *Strickland* v. *Washington*, 466 U.S. 668, 689 (1984). See also *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). It is not designed to guarantee "a meaningful relationship" between a defendant and the counsel of his choice. *Morris* v. *Slappy*, 461 U.S. 1, 13-14 (1983).

The principal concern underlying the Sixth Amendment guarantee stemmed from the recognition that an unaided layman has little skill in arguing the law or in coping with an intricate procedural system. *United States* v. *Ash*, 413 U.S. 300, 307 (1973). In addition, the assistance of counsel was deemed necessary to minimize the imbalance in the adversary system that results when "the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938). There is no evidence, however, that the Sixth Amendment was intended to protect a defendant's decision to engage a particular lawyer. The debates that led up to the adoption of the Assistance of Counsel Clause throw little light on the matter; about all that can be drawn from the historical record is that the Framers intended to alter the rule, then current in England, that denied the assistance of counsel to defendants in

all felony cases, except those in which treason was charged. See *Faretta* v. *California*, 422 U.S. 806, 823-826, 831 n.42 (1975); *Powell* v. *Alabama*, 287 U.S. 45, 60 (1932).

This Court's cases construing the Assistance of Counsel Clause say nothing about the right to select a particular attorney.[5] To the contrary, the Court

[5] *Faretta* v. *California*, 422 U.S. 806 (1975), which is often cited in support of an asserted constitutional right to choose a particular lawyer has nothing to do with the choice of counsel. The Court in *Faretta* held that implicit in the structure of the Sixth Amendment is the right of a criminal defendant to forgo counsel and to represent himself. 422 U.S. at 818-820 & n.15. The Court did not suggest that the right to forgo counsel encompasses the right to choose a particular attorney if the defendant seeks to be represented by counsel.

Powell v. *Alabama*, 287 U.S. 45 (1932), is also unenlightening on this point. *Powell* had nothing to do with a court's rejection of a defendant's chosen counsel; rather, the state court system at issue in *Powell* had denied the defendants the opportunity to obtain any counsel at all. This occurred, moreover, at a time when appointment of counsel for indigent defendants was far from common. Therefore, when the Court stated that the defendants should have been "afforded a fair opportunity to secure counsel of [their] choice" (287 U.S. at 53), the Court was not suggesting that the defendants had the right to engage the services of a *particular* lawyer. Rather, the Court was emphasizing that the defendants should have been given the opportunity to obtain the effective assistance of counsel by the only certain method then available—employment of private counsel. Likewise, in *Chandler* v. *Fretag*, 348 U.S. 3, 9 (1954), the Court stated that the defendant's right to be heard through his own counsel was "unqualified." The Court, however, used that term not to suggest that a defendant has an absolute right to counsel of his choice, but merely to contrast his "qualified right" to appointed counsel with his undoubted right to hire counsel on his own.

Petitioner's reliance (Pet. Br. 31) on *Flanagan* v. *United States*, 465 U.S. 259 (1984), is also misplaced. In the passage

has stressed that in judging whether the requirements of the Sixth Amendment have been satisfied, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States* v. *Cronic*, 466 U.S. 648, 657 n.21 (1984). The reason for that is that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial" (*id.* at 658). Thus, as long as a defendant receives the assistance of a qualified attorney who provides effective representation, the demands of the Sixth Amendment have been met. *Strickland* v. *Washington*, 466 U.S. at 689; *United States* v. *Cronic*, 466 U.S. at 656; *United States* v. *Morrison*, 449 U.S. at 365. The attorney need not be the one the defendant would have preferred, for

that petitioner cites, the Court was discussing whether a defendant's "*asserted* right to counsel of one's choice" was "effectively unreviewable on appeal from a final judgment" (*id.* at 267, 268 (emphasis added)). Because the Court found that an order disqualifying counsel "does not qualify as an immediately appealable collateral order" (*id.* at 269), the Court had no occasion to reach question concerning the existence of that asserted right to counsel of choice.

A closer, if older, authority is *Andersen* v. *Treat*, 172 U.S. 24 (1898), which suggests that the choice of a particular lawyer is not protected by the Sixth Amendment. In *Andersen*, a habeas corpus petitioner claimed that "he was denied 'the assistance of counsel for his defense,' that is, the assistance of counsel of his own selection" (*id.* at 29). The defendant's complaint was that he was not allowed to retain the lawyer hired by five other suspects because the district judge believed his defense to be "inconsistent with the defense of others charged" (*id.* at 30). This Court affirmed the denial of habeas corpus relief, suggesting that the claim did not reflect the denial of an "essential right" of the defendant's (*id.* at 31).

whatever reason, as long as the attorney provides capable representation. See *United States* v. *Cronic*, 466 U.S. at 657 n.21 ("If counsel is a reasonably effective advocate, he meets constitutional standards irrespective of his client's evaluation of his performance.").

B. The Right To Engage The Services Of A Particular Lawyer Is A Qualified One, Subject To Reasonable Restrictions

Although the Sixth Amendment does not protect a criminal defendant's desire to be represented by a particular attorney, that is not to say that the prosecution or the court can simply disregard that interest. The Due Process Clause of the Fifth Amendment protects a defendant against the creation of arbitrary or unreasonable impediments to his efforts to defend himself. See *Powell* v. *Alabama*, 287 U.S. at 69 (a trial court would violate "due process in the constitutional sense" if it "were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him"). That protection includes a prohibition against arbitrary or unreasonable interference with the defendant's efforts to obtain the services of a particular lawyer. By its terms, however, a rule against unreasonable restrictions on the defendant's efforts to retain a particular lawyer does not constitute an absolute right to counsel of the defendant's choice.

Every court of appeals has explicitly held, or at least clearly recognized, that the accused has no absolute right to counsel of his choice.[6] Thus, unlike

[6] See, *e.g.*, *United States* v. *Poulack*, 556 F.2d 83, 86 (1st Cir.), cert. denied, 434 U.S. 986 (1977); *United States* v. *Ostrer*, 597 F.2d 337, 341 (2d Cir. 1979); *United States* v. *Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978); *United States* v. *Inman*, 483 F.2d 738, 739-740 (4th Cir. 1973), cert. denied, 416 U.S. 988 (1974); *United States* v. *Kitchin*, 592 F.2d 900, 903 (5th Cir.), cert. denied, 444 U.S. 843 (1979); *Linton* v. *Perini*, 656 F.2d 207, 209 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982); *United States* v. *Gaines*, 529 F.2d 1038, 1043 (7th Cir. 1976); *United States* v. *Agosto*, 675 F.2d 965, 970 n.4 (8th Cir.), cert. denied, 459 U.S. 834 (1982); *United States* v. *Vargas-Martinez*, 569 F.2d 1102, 1104 (9th Cir. 1978); *United States* v. *Peister*, 631 F.2d 658, 661 (10th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *United States* v. *Hobson*, 672 F.2d 825, 827, 829 n.* (11th Cir.), cert. denied, 459 U.S. 906 (1982); *United States* v. *Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), cert. denied, 439 U.S. 1069 (1979).

the basic right to the assistance of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335, 344-345 (1963), or the right of self-representation, *Faretta* v. *California*, *supra*, each of which must be respected in all serious criminal cases, the defendant's interest in being represented by counsel of his choice—even if it enjoys some constitutional protection—is subject to reasonable limitations.

First, and most obvious, a defendant's right to counsel of his choice is limited by the willingness of a particular attorney to represent him. No court to our knowledge has ever held that it has the power to force a lawyer to represent a defendant simply because the defendant wants that particular lawyer. Thus, the right to counsel of choice, if any, is wholly unlike the right to counsel recognized in *Powell* and *Gideon*, which can and must be enforced directly by the courts.

The decisions of this Court and other federal courts have recognized as legitimate and permissible a number of other restrictions on the asserted right to counsel of choice. For example, in view of the public need for the efficient administration of crimi-

nal justice, the trial court has the discretion to deny a continuance in order to control its own docket, even when denying the continuance will effectively interfere with a defendant's desire to be represented by a particular lawyer.[7] The courts have also consistently held that even though an indigent defendant is entitled to the appointment of counsel, he is not entitled to the appointment of the particular lawyer of his choosing.[8]

Even when a defendant has succeeded in retaining the person he wishes, district courts have been held to possess considerable power to disapprove the defendant's choice of representative. Thus, a defendant is not entitled to be represented by a layman,[9] even if the layman has legal training.[10] And, as

[7] See generally *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964) ("The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel."). See also *United States* v. *Burton*, 584 F.2d at 489-492; *United States* v. *Poulack*, 556 F.2d at 86; *United States* v. *Inman*, 483 F.2d at 740; *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210, 1213-1216 (3d Cir. 1969).

[8] *Morris* v. *Slappy, supra*; *United States* v. *Davis*, 604 F.2d 474, 478-479 (7th Cir. 1979); *United States* v. *Smith*, 464 F.2d 194, 197 (10th Cir.), cert. denied, 409 U.S. 1066 (1972); *United States* v. *White*, 451 F.2d 1225, 1226 (6th Cir. 1971).

[9] *United States* v. *Bertolini*, 576 F.2d 1133 (5th Cir. 1978); *United States* v. *Buttorff*, 572 F.2d 619, 627 (8th Cir.), cert. denied, 437 U.S. 906 (1978); *United States* v. *Wilhelm*, 570 F.2d 461, 466 (3d Cir. 1978); *United States* v. *Taylor*, 569 F.2d 448, 450-451 (7th Cir.), cert. denied, 435 U.S. 952 (1978); *United States* v. *Kelley*, 539 F.2d 1199, 1203 (9th Cir.), cert. denied, 429 U.S. 963 (1976).

[10] *United States* v. *Grismore*, 546 F.2d 844, 847 (10th Cir. 1976) (disbarred lawyer); *United States* v. *Hinderman*, 528

petitioner himself acknowledges (Pet. Br. 33 n.22), a court need not permit representation even by a licensed attorney if the attorney is not a member of the court's bar.[11]

Even if the defendant's chosen counsel is otherwise qualified to practice before the court, he may be disqualified if his participation as counsel for the defendant would unfairly prejudice the government or other parties. Thus, when a former prosecutor seeks to participate as defense counsel in a case in which he was previously involved as an attorney for the government, it is accepted without serious debate that counsel can be disqualified, even over the defendant's objection.[12] Similarly, if a defense lawyer's

F.2d 100, 102-103 (8th Cir. 1976) (same). See generally *Ex parte Wall*, 107 U.S. 265, 288 (1883) (holding that criminal conviction is not a prerequisite for striking attorney from rolls of practicing attorneys, stating "the courts ought not to hesitate * * * to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws").

[11] See *Leis* v. *Flynt*, 439 U.S. 438 (1979) (holding that out-of-state attorneys, not admitted to practice law in Ohio, had no constitutional right of their own to appear pro hac vice on behalf of criminal defendant in Ohio state courts). See also *Bedrosian* v. *Mintz*, 518 F.2d 396, 400-401 (2d Cir. 1975) (state court's refusal to appoint out-of-state counsel for indigent defendants held constitutional). See generally 28 U.S.C. 1654 (permitting parties in federal courts to conduct their cases themselves or by such counsel "as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein"); Rules 5 and 6 of the Supreme Court of the United States (regulating appearance of attorneys before this Court).

[12] See *United States* v. *Washington*, 797 F.2d 1461, 1466 (9th Cir. 1986); *United States* v. *Miller*, 624 F.2d 1198 (3d

representation would breach the attorney-client privilege of a current or former client who does not wish to waive that privilege, the attorney can be disqualified.[13] And counsel can be disqualified if it appears that he will have to be called as a fact witness with respect to the transactions at issue in the trial, or where his personal involvement in the charged criminal conduct makes it difficult or impossible for him to perform adequately as counsel.[14] The question presented in this case is whether that principle applies to cases in which the attorney's representation would violate prevailing ethical standards or would tend to undermine public confidence in the integrity of the legal system.

C. Disqualification Of Counsel Is Permissible If Multiple Representation Would Violate Ethical Standards Or Undermine The Integrity Of The Trial Process

1. The problem with multiple representation stems from the principle that "[n]o man can serve two masters." *Matt.* 6:24. And the risk that an attorney serving two clients will "hold to the one, and despite the other" (*ibid.*) is nowhere so great as in the defense of a criminal prosecution.

Cir. 1980); *United States* v. *Ostrer*, 597 F.2d at 341; *United States* v. *Kitchin*, 592 F.2d at 903.

[13] See *United States* v. *Ditommaso*, 817 F.2d 201, 220 (2d Cir. 1987); *United States* v. *O'Malley*, 786 F.2d 786, 792 (7th Cir. 1986); *United States* v. *James*, 708 F.2d 40, 46 (2d Cir. 1983); *United States* v. *Provenzano*, 620 F.2d 985, 1005 (3d Cir.), cert. denied, 449 U.S. 899 (1980).

[14] See *Grady* v. *United States*, 715 F.2d 402, 404 (8th Cir. 1983); *United States* v. *Snyder*, 707 F.2d 139, 146 (5th Cir. 1983); *United States* v. *Salinas*, 618 F.2d 1092, 1093 (5th Cir.), cert. denied, 449 U.S. 961 (1980); *United States* v. *Castellano*, 610 F. Supp. 1151, 1165 (S.D.N.Y. 1985).

While there is no flat prohibition against multiple representation of defendants in criminal cases, and while such representation does not necessarily violate the Sixth Amendment's guarantee of effective assistance of counsel (*Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475, 482 (1978)), this Court has long recognized the risks inherent in multiple representation. See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60 (1942). As the court of appeals noted in *United States* v. *Curcio*, 680 F.2d 881, 887 (2d Cir. 1982), the interests of defendants can diverge at any stage in the proceedings. The jointly retained attorney may have to prefer the interests of one defendant over the other at almost any point—in plea bargaining, in determining whether and how to present a defense, in deciding whether and how to cross-examine a witness whose testimony may help one defendant and hurt the other, in deciding whether either client should testify, and in formulating a closing argument and sentencing presentation that emphasizes the disparity in the evidence against each defendant and their relative culpability. The dilemmas created by multiple representation are particularly insidious because it is often hard to determine whether the resolution of those dilemmas is the product of trial strategy rather than a conflict of interest. See *Curcio*, 680 F.2d at 887. And it is particularly difficult to assess the damage caused by multiple representation, because the evil "is in what the advocate finds himsel compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and the sentencing process." *Holloway* v. *Arkansas*, 435 U.S. at 490.[15]

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[15] See generally, Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Re-*

As the courts and commentators have explained, the problems posed by multiple representation are compounded by the fact that the lay defendant will often fail to appreciate the way in which a conflict can affect an attorney's performance of his duties. Nor can the court be depended upon to advise the defendant of all of the possibilities, for the court will usually lack sufficient familiarity with the facts, and may be prevented from gaining such familiarity by the Fifth Amendment and attorney-client privileges.

The private bar cannot always be counted on to educate joint defendants adequately or to withdraw in all cases in which multiple representation involves serious conflicts. First, it may be in the interest of some defendants, but not others, that the joint representation be maintained; the lawyer saddled with these conflicting interests will often be in a poor position to give each client adequate advice regarding the decision whether to waive the right to conflict-free representation. Second, the retained counsel's financial interests inhibit voluntary withdrawal, and may contribute to the difficulty of giving the client disinterested advice on whether to retain separate counsel.[16]

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sponsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125-135 (1978); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal,* 64 Va. L. Rev. 939, 941-950 (1978); Comment, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants,* 68 J. Crim. L. & Criminology 226, 233-239 (1977); Developments in the Law, *Conflicts of Interest in the Legal Profession,* 94 Harv. L. Rev. 1244, 1394-1396 (1981). See also *United States* v. *DeFillipo,* 590 F.2d 1228, 1238 & n.17 (2d Cir.), cert. denied, 442 U.S. 920 (1979).

[16] See Geer, *supra,* 62 Minn. L. Rev. at 145, 152-153; Judd, *Conflicts of Interest—A Trial Judge's Notes,* 44 Fordham L.

In light of the pervasiveness and the subtlety of conflicts of interest resulting from multiple representation, some have called for the total abolition of multiple representation in criminal cases. Yet because multiple representation can be beneficial to defendants in some instances—by permitting cost savings and making it easier to coordinate defenses—the bench and bar have not insisted that every defendant be separately represented in every criminal case. While stopping short of an absolute prohibition, however, the legal profession and the courts have adopted intermediate steps designed to prevent ineffective assistance of counsel attributable to multiple representation.

In the federal system, the most important safeguard against the risks created by multiple representation is Rule 44(c), Fed. R. Crim. P. That rule requires federal district courts to inquire into all instances of multiple representation of defendants and to "take such measures as may be appropriate," unless "it appears that there is good cause to believe no conflict of interest is likely to arise."

Rev. 1097, 1099-1107 (1976); Lowenthal, *supra,* 64 Va. L. Rev. at 950-972 (survey showing that while many public defenders never engage in multiple representation, the private bar is far more willing to represent co-defendants). See also *Cuyler* v. *Sullivan,* 446 U.S. at 346-347 n.11 (noting that while public defender offices have "a strong policy against undertaking multiple representation in criminal cases," the "private bar may be less alert to the importance of avoiding multiple representation"). Cf. *Wood* v. *Georgia,* 450 U.S. 261, 265 n.5 (1981) (Court reached conflict-of-interest question even though the issue was not raised in the certiorari petition, because the attorney who "prepared the petition for certiorari was the lawyer on whom the conflict-of-interest charge focused," and it was "unlikely that he would concede that he had continued improperly to act as counsel").

Although Rule 44(c) does not specifically catalogue the measures that may be employed, the Advisory Committee Note to the rule expressly states that one of the measures that a court may consider is to "order that the defendants be separately represented in subsequent proceedings in the case." Rule 44(c), Advisory Committee Note, 77 F.R.D. 594, 601 (1978). The Advisory Committee addressed the question whether disqualifying defense counsel would violate the defendant's constitutional right to counsel of his choice and concluded that it would not. Quoting from *United States* v. *Dolan*, 570 F.2d 1177 (3d Cir. 1978), the Advisory Committee stated (77 F.R.D. at 603) that a court's disqualification of an attorney representing multiple defendants would not violate the Sixth Amendment even if the defendants all expressed a desire to retain that attorney. Multiple representation that leads to a conflict of interest "not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver." Under those circumstances, "the court can elect to exercise its supervisory authority over members of the bar to enforce the ethical standard requiring an attorney to decline multiple representation" (*ibid.*).[17]

[17] With regard to appointed lawyers, the Criminal Justice Act provides that separate counsel must be appointed "for defendants who have such conflicting interests that they cannot properly be represented by the same counsel." 18 U.S.C. 3006A(b). The Act contains no provision for defendants to insist on joint representation, and it has been construed to provide the district court with the discretion to refuse to permit joint representation for indigent defendants. See *Ford* v. *United States*, 379 F.2d 123, 126 (D.C. Cir. 1967).

The bar has also sought to prevent multiple representation wherever it gives rise to the likelihood of a conflict of interest. The American Bar Association has promulgated a mandatory disciplinary rule forbidding multiple representation unless "it is obvious that [the lawyer] can adequately represent the interest of each [client] and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." Model Code of Professional Responsibility DR 5-105 (C) (1980).[18] The ABA's Standards Relating to the Defense Function § 3.5(b) (1980) similarly notes that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations."

[18] The Model Rules of Professional Conduct provide that a lawyer "shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." Model Rules of Professional Conduct Rule 1.7 (1983). That rule does not retreat from DR 5-105(C). If, in a particular case, it is reasonable to conclude that conflicts of interest will arise, joint representation may not be undertaken, notwithstanding counsel's willingness to undertake it. Furthermore, the comment to the rule emphasizes that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."

2. Petitioner asserts (Pet. Br. 52-53) that since he may waive his right to the assistance of counsel entirely, it follows that he may waive his right to conflict-free counsel. While that much is true, it does not mean that a court must accept his waiver, and that of his co-defendants, and permit them to insist on being represented by conflict-ridden counsel.

The fact that a defendant may waive his right to have his trial conducted in a particular manner does not mean that he is entitled to insist on the trial being conducted in the *opposite* manner. The Court made that point clear in *Singer* v. *United States*, 380 U.S. 24, 34-35 (1965), where the Court concluded that a defendant's right to waive the Sixth Amendment guarantee of a trial by jury did not give him a right to insist on a bench trial. The *Singer* Court gave other similar examples: (1) an accused has no absolute right to compel a private trial, even though he has a right to a public trial; (2) an accused cannot compel the transfer of his trial to a district in which the crime was not committed, even though he has a right to be tried where the crime was committed; and (3) an accused cannot compel the government to try his case by stipulation, even though he has a right to confront the witnesses against him (380 U.S. at 35). There is no reason to accord any different treatment to petitioner's asserted right to counsel of his choice.[19]

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[19] In *Faretta*, the Court was careful to point out that the right of self-representation did not exist because it was possible to waive the right to the assistance of counsel, but rather because that right had an independent constitutional basis. See 422 U.S. at 819-820 n.5 ("We do not suggest that this right [of self-representation] arises mechanically from a defendant's power to waive the right to the assistance of counsel. * * * On the contrary, the right must be independently found in the structure and history of the constitutional text.").

Under this analysis, the fact that petitioner may have waived his right to conflict-free counsel does not end the matter. The Constitution does not entitle petitioner to insist on legal representation that does not meet established standards of ethical professional conduct or that would otherwise undermine the integrity of the trial process. By "waiving" his right to conflict-free counsel, petitioner cannot override the public interest in the fairness of criminal trials and the integrity of the legal profession. "The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982).

All the courts of appeals that have faced the issue recognize that a criminal defendant has no absolute right to insist on multiple representation in spite of conflicts of interest on his attorney's part. While emphasizing the importance of the defendant's right to counsel of his choice, each of the courts of appeals has preserved the district court's discretion to disqualify counsel in compelling circumstances, even in the face of a waiver. See, *e.g.*, *United States* v. *Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986) (district court has discretion to limit defendant's choice of counsel "when insistence upon it would disproportionately disadvantage the government or interfere with the ethical and orderly administration of justice"); *United States* v. *O'Malley*, 786 F.2d 786, 792 (7th Cir. 1986) (affirming order disqualifying defense counsel on motion of government, where former client of attorney will testify and attorney "possessed information with potential impeachment value which he gained through confidential communications" with

the witness); *United States* v. *Reese*, 699 F.2d 803, 805 (6th Cir. 1983) ("compelling circumstances" may justify overriding waiver of right to conflict-free counsel); *United States* v. *Flanagan*, 679 F.2d 1072, 1074, 1076 (3d Cir. 1982) (affirming order disqualifying defense counsel where jointly represented defendants had inconsistent defenses), rev'd on other grounds, 465 U.S. 259 (1984); *United States* v. *Agosto*, 675 F.2d 965, 972, 976-77 (8th Cir.) (affirming order disqualifying defense counsel for secretary, where primary loyalty of counsel was to secretary's employer and co-defendant), cert. denied, 459 U.S. 834 (1982)); *United States* v. *Dolan*, 570 F.2d 1177, 1183 (1978) (affirming order disqualifying defense counsel, where defendants had inconsistent defenses).

The Second and Fifth Circuits once appeared to endorse a rule flatly forbidding a district court from disqualifying counsel from multiple representation if the defendants were all willing to waive their right to conflict-free counsel. See *United States* v. *Curcio*, 680 F.2d 881, 885-888 & n.3 (2d Cir. 1982); *United States* v. *Garcia*, 517 F.2d 272 (5th Cir. 1975). Subsequent decisions from the Second Circuit, the Fifth Circuit, and the Eleventh Circuit, however, suggest that the principles of *Garcia* and *Curcio* are not as inflexible as they may have seemed, and that in making a disqualification decision, a district court may weigh not only the defendant's interest in representation by counsel of his choice, but other interests as well, including the interest of the public in the proper administration of justice. See *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 250-251 (2d Cir.), cert. denied, 475 U.S. 1108 (1986) ("courts have the power and duty to disqualify counsel where the public interest in maintaining the integrity of the judicial system outweighs the accused's

constitutional right"); *United States* v. *Ditommaso*, 817 F.2d 201, 219 (2d Cir. 1987) (disqualification appropriate "when required by the fair and proper administration of justice"); *United States* v. *James*, 708 F.2d 40, 45 (2d Cir. 1983) (disqualification inquiry requires weighing competing interests "of the government, the witness, and the public" against the defendant's desire to be represented by a particular counsel); *United States* v. *Snyder*, 707 F.2d 139, 143 (5th Cir. 1983) (affirming order disqualifying defense counsel where defense counsel was an indicted co-conspirator); *United States* v. *Salinas*, 618 F.2d 1092, 1093 (5th Cir.) (affirming order disqualifying defense counsel where counsel was a target of an investigation concerning the events for which his clients were indicted), cert. denied, 449 U.S. 961 (1980); *In re Paradyne Corp.*, 803 F.2d 604, 611 n.16 (11th Cir. 1986) (right to counsel "does not override the broader societal interests in the effective administration of justice * * * or in the maintenance of 'public confidence in the integrity of our legal system'"); *United States* v. *Padilla-Martinez*, 762 F.2d 942, 946 (11th Cir.), cert. denied, 474 U.S. 952 (1985).

What all these courts of appeals have recognized is that district courts must preserve some discretion to override a defendant's waiver of conflict-free representation when the interests of justice so demand. That includes cases in which the courts must act to protect the integrity of the trial process, the ethical standards of the legal profession, or even, in egregious cases, fairness to the defendant. In sum, the federal rules, attorney ethical standards, and the lower courts all support the view that when there is a substantial risk of a serious conflict of interest as a result of joint representation, the district court

should retain the discretion to insist on separate representation notwithstanding a "knowing and intelligent" waiver by the defendant and the other parties to the multiple representation.

3. Petitioner's waiver argument is fraught with difficulties for the fair and efficient administration of the criminal justice system. It is inherently difficult to determine whether a lay defendant has intelligently and knowingly waived any objections to conflicts of interest that may arise in the later course of criminal proceedings. See, *e.g.*, *United States ex rel. Tonaldi* v. *Elrod*, 716 F.2d 431, 437-439 (7th Cir. 1983). Because of the trial court's limited knowledge of the facts of a particular case before trial, as well as the court's inability to delve into attorney-client confidences, the district court is not in a position to educate the defendant fully with regard to the possible conflicts that could arise from a particular joint representation. Geer, *supra*, 62 Minn. L. Rev. at 141-152. Nor can conflict-ridden counsel be relied upon to obtain an informed waiver. *Id.* at 145; Rule 44(c), Advisory Committee Note, 77 F.R.D. at 596. In any event, it is quite likely that a lay defendant will fail to appreciate how the broad array of potential conflicts growing out of joint representation will injure his defense. Of necessity, he is to some extent buying a pig in a poke.

For those reasons, a finding of intelligent and knowing waiver of the right to conflict-free counsel is tailor-made for post-conviction attack. See, *e.g.*, *United States ex rel. Tonaldi* v. *Elrod*, *supra*; *United States* v. *Vowteras*, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); Rule 44(c), Advisory Committee Note, 77 F.D.R. at 594. Permitting district courts to disqualify defense counsel when the circumstances warrant therefore not only

enforces the ethical standards of the legal profession, but furthers society's interest in the speedy and final determination of criminal cases as well. For by disqualifying counsel when there is a substantial potential for a conflict of interest, there will be no need for subsequent litigation focusing on the validity of the defendant's waiver of his right to conflict-free counsel and related due process claims. See *United States* v. *Dolan*, 570 F.2d at 1184; *United States* v. *Mari*, 526 F.2d 117, 119-121 (2d Cir. 1975) (Oakes, J., concurring), cert. denied, 429 U.S. 941 (1976). See generally Rule 44(c), Advisory Committee Note, 77 F.R.D. at 596-597.[20]

[20] We are disturbed by the implication in some cases that defendants may attack their convictions on conflict of interest grounds even after validly waiving their right to conflict-free counsel. See, *e.g.*, *United States ex rel. Tonaldi* v. *Elrod*, 716 F.2d at 436 (although court finds that habeas corpus petitioner knowingly waived his right to separate counsel, it refuses to foreclose possibility that petitioner's attorney "acted incompetently in deciding to represent the petitioner and his co-defendants" despite the waiver); *United States* v. *Vowteras*, 500 F.2d at 1211 (the defendants having been "fully advised of the facts underlying the potential conflict * * * cannot now repudiate their choice [of joint representation] in the absence of a credible showing of 'some specific instance of prejudice, some real conflict of interest, resulting from a joint representation' "). See also *Cuyler* v. *Sullivan*, 446 U.S. at 353 (Brennan, J., concurring in part and in result); *id.* at 354 n.1 (Marshall, J., concurring in part and dissenting in part). In our view, a defendant who has effectively waived his right to conflict-free counsel should be forever barred from raising ineffective assistance of counsel claims based on the conflicting interests of counsel. See, *e.g.*, *United States* v. *Flanagan*, 679 F.2d at 1076 ("A truly knowing and intelligent waiver accepted by the court will insulate a conviction from later attack."). To the extent that a valid waiver is not to be construed as genuinely final, however, that is all the more reason to recognize the authority of the district court

The criminal process is not merely a contest between the government and the accused. The criminal justice system also serves as "an outlet for community concern, hostility, and emotion." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 571 (1980) (opinion of Burger, C.J.). That outlet for community concern and emotion, furthermore, is more than simply a channel for vengeance. Rather, to a people proud of its traditional freedoms, the criminal process is also a daily demonstration of the fairness of our law. It is for that important reason that our criminal process must "satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954). See *Richmond Newspapers, Inc.*, 448 U.S. at 571-572 (opinion of Burger, C.J.); *id.* at 593-594 (Brennan, J., concurring in part and in result); *Gannet Co.* v. *DePasquale*, 443 U.S. 368, 427-429 (1979) (Blackmun, J., concurring in part and dissenting in part).

Accordingly, it is not up to the defendant in a criminal trial to vitiate the fairness of that proceeding by deciding for himself to employ counsel rendered ineffective by conflicts of interest, for an unjust conviction not only injures the defendant but is inimical to the community's trust in the integrity of its courts.[21] The stated goal of the criminal process is to "provide for the just determination of every criminal proceeding" (Fed. R. Crim. P. 2), and the fulfillment

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to require separate counsel in cases in which there is a substantial likelihood that the representation will be infected by a conflict of interest.

[21] See Geer, *supra*, 62 Minn. L. Rev. at 155-157; Comment, *supra*, 68 J. Crim. L. & Criminology at 251; Developments, *supra*, 94 Harv. L. Rev. at 1394.

of that goal requires more than simply according substantial deference to a defendant's expressed desire to retain a particular attorney. It requires as well that the public's "interest in having criminal prosecutions decided on truthful and complete records" be given full recognition, even though that interest "does not necessarily coincide with that of the accused." *Gannett Co.* v. *DePasquale*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part).[22] In short, that a defendant has the right to a fair trial does not mean he has the right to insist upon an unfair trial.[23]

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[22] Cf. Fed. R. Crim. P. 11(f), which requires that "[n]otwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Thus, it is not up to the defendant to determine that he shall be convicted in circumstances falling below certain minimum standards insisted upon by society.

[23] A defendant's willingness to accept an unfair trial is not as farfetched as it sounds. A less culpable defendant may be willing to forgo efforts to protect his own rights in order to help a more culpable co-defendant, who may be a friend or family member. Geer, *supra*, 62 Minn. L. Rev. at 145. Worse, he may do so to forestall retaliation from a more powerful co-defendant or from a criminal organization of which he is a member. See Staff of President's Comm'n on Organized Crime, *Materials on Ethical Issues for Lawyers Involved with Organized Crime Cases* at 4-7 (1985) (finding that members of organized crime families are "required to have lawyers trusted by the Family," that "more often than not the attorney's fees are paid by third parties," that "[a]lmost invariably fees are paid in cash," that "[c]ertain defendants would be represented for a nominal fee since the attorney had already been paid from another source," and that "[t]he attorney is expected to, and will, inform the boss when a client is suspected of cooperating with the government").

D. Multiple Representation Posed A Substantial Risk Of A Conflict Of Interest In This Case

1. The district court carefully balanced petitioner's desire to retain Iredale with competing considerations arising out of Iredale's representation of two other defendants and properly concluded that the proposed substitution would be improper. Iredale's proposed representation of three codefendants of varying levels of culpability, one of whom was scheduled to testify against the other and none of whom had yet been sentenced, was fraught with potential conflicts of interest. One of Iredale's clients, Bravo, would be testifying against another, petitioner; because it appeared that Iredale might need to cross-examine Bravo, his representation of petitioner presented the risk that he would either use confidential information obtained from Bravo, or sacrifice petitioner's interests by declining to cross-examine Bravo or by not cross-examining him vigorously. In addition, the multiple representation posed the risk that Iredale would not be able to defend one client by emphasizing the culpability of the others, including the one who had agreed to testify for the government. Under the ethical principles laid down for the legal profession, it was neither "obvious" that Iredale could "adequately represent the interest" of each defendant (Model Code of Professional Responsibility DR 5-105(C) (1980)), nor "clear that no conflict [was] likely to develop" (§ 3.5(b), Standards Relating to the Defense Function (1980)). Rather, as the district court concluded, "the Court really has no choice at this point other than to find that an irreconcilable conflict of interest exists" (J.A. 100). In such circumstances, the district court's refusal to permit the proposed substitution was entirely appropriate, notwithstanding petitioner's avowed desire to retain Iredale.

A case like this one demonstrates the risks involved in giving dispositive weight to defendants' waivers of their right to conflict-free representation. Each of the defendants might well have perceived that he had something to gain from the multiple representation, while disregarding what he had to lose. Bravo and Gomez-Barajas might well have been content to have Iredale represent petitioner, in the hope that Iredale would not conduct petitioner's defense in a way that would adversely affect them. In addition, Bravo might well have consented to the multiple representation, feeling secure that his own lawyer, Iredale, would not be unduly rigorous in challenging him on cross-examination. At the same time, petitioner might have consented to the multiple representation in the hope that retaining the attorney who represented the other defendants would minimize the risk that Bravo would testify in a damaging fashion at his trial or that Iredale would bring out information unfavorable to petitioner in the course of his representation of the other two defendants. Obviously, it would be difficult for Iredale to make special accommodations for one defendant without injuring another; yet each defendant might have assumed that he would be the one who would be the beneficiary of the conflict of interest, and thus each might have consented to the multiple representation even though that representation could well disadvantage one or even all three defendants.

Several additional features of this case also support the district court's refusal to permit Iredale to represent petitioner. First, petitioner's interest in being represented by Iredale was entitled to less weight in the circumstances of this case than it might be accorded in other settings. Petitioner did not express an interest in having Iredale as his attorney until

after Bravo pleaded guilty. At that time petitioner was already represented by the attorney of his choice, and he gave no indication that he was dissatisfied with that attorney's performance (Pet. App. 5). As petitioner's attorney explained to the district court, petitioner was not complaining about his retained counsel's performance; he simply wished to add Iredale to "his defense team" (J.A. 124).

Second, as the court of appeals noted (Pet. App. 9), the substitution request was not made until shortly before the trial. All courts recognize that a district court has discretion to refuse to accept a substitution of counsel, in spite of a waiver from the defendant, when the request for substitution is made at the eleventh hour. See, *e.g.*, *United States* v. *Mastroianni*, 749 F.2d 900, 913-914 (1st Cir. 1984); *United States* v. *Silva*, 611 F.2d 78, 79 (5th Cir. 1980). In this case, the hearing on the motion had to be held on an expedited basis the day before trial, and in light of the short time available to resolve the matter, it is open to question whether valid waivers could have been obtained from all three defendants. In order to obtain waivers that would be secure from later challenge, it might have been necessary to ensure that both Bravo and Gomez-Barajas had separate representation for purposes of the substitution hearing, and it would have been necessary for the court to conduct a detailed inquiry in person, rather than simply accepting Iredale's representation that they were willing to waive any objection to his representation of petitioner. The shortness of time before trial made such procedures impractical, if not impossible.[24]

[24] Petitioner's statement (Br. 60) that this "inquiry could have been conducted in less than an hour" is wholly unsupported. The trial judge made it very clear that he thought that a detailed and time-consuming inquiry would have been necessary (J.A. 119-120):

> [O]ne of the things that troubles me about this whole thing, and admittedly it's a difficult call for me, is that Mr. Wheat retained counsel of his choice initially. His counsel has been apparently properly representing him all through this case for months and months and months and up until Thursday of last week was * * * ready, willing and able to proceed with this trial tomorrow morning at 9:00 o'clock. And then all of a sudden we are faced with this last minute problem and I'm faced with whether I'm going to have to have hearings with respect to these conflict issues, call the defendants in here, put them on the stand, go through hearings, and I just think it's too late to get involved in this.
>
> I recognize Mr. Wheat has a constitutional right to counsel of choice but he, of course, made that choice a long time ago and hired Mr. Semco. So I think it's too late in the game to get involved in this.

See also J.A. 100, 105.

Third, the circumstances of the substitution motion in this case raised a particularly serious risk of undermining public confidence in the integrity of the legal system. Petitioner moved to have Iredale represent him immediately after one of the co-defendants represented by Iredale pleaded guilty, and at a time when it appeared likely that that co-defendant might testify for the government. The public could well view that arrangement with concern for two reasons. On the one hand, petitioner could be perceived as trying to influence the witness's testimony (*e.g.*, to keep him from turning on petitioner at trial) by hiring that witness's attorney as his own.[25] Alter-

[25] Iredale's assurance to the court (J.A. 57) that Bravo "has no potential evidence or information he could give the

natively, the selection of Bravo's attorney could be viewed as an effort on petitioner's part to obtain the advantage of confidential information revealed by Bravo to his attorney before Bravo testified against petitioner.

The risk of adverse public perception was increased in this case by the fact that Iredale represented not only Bravo, but Gomez-Barajas as well. The public could conclude that by retaining Iredale, petitioner was seeking to ensure that Gomez-Barajas, petitioner's alleged marijuana supplier, would not become a government witness and testify against petitioner at trial. Alternatively, the public could have perceived that the multiple representation of petitioner and Gomez-Barajas was engineered to protect Gomez-Barajas from being called as a possible defense witness for petitioner or otherwise being embarrassed by petitioner's defense. Iredale's representation of both Gomez-Barajas and petitioner would have made

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Government against [petitioner]" would merely add fuel to that fire. In fact, as petitioner acknowledges (Br. 23), Bravo corroborated the key government witness against petitioner on two overt acts charged in the indictment (see J.A. 20). Bravo delivered marijuana to Vidal, which Vidal in turn gave to petitioner (see Tr. 122, 302, 729, 733). Thus, the public could be properly concerned in this case about "possible manipulation of testimony resulting from agreements between various clients, lawyers, and possible third persons not before the court" (Pet. App. 10).

Petitioner's repeated assertion (Br. 46-47, 55, 62) that the prosecutor called Bravo as a witness as a way of "engineer-[ing]" a conflict has no basis in the record. The trial judge, who was thoroughly familiar both with the lawyers and with the facts of the case, dismissed that suggestion out of hand (J.A. 67), and it is belied by the valuable testimony actually provided by Bravo.

an objective judgment difficult as to whether it might be in petitioner's interest to call Gomez-Barajas as a witness. When the substitution was first proposed, the prosecutor noted that petitioner's retained attorney had expressed "at least the potential desire of calling * * * Mr. Juvenal Gomez-Barajas as a possible witness" (J.A. 65). Iredale dismissed that suggestion peremptorily: "Well, this is the first I have ever heard of that. Mr. Gomez is not going to testify in an American courtroom ever again in his life" (*ibid.*). Iredale was thus making it clear where his primary loyalties lay and the consequent difficulty of making an independent judgment of petitioner's interest.

In light of the hierarchical structure of many criminal conspiracies, joint representation of the lead defendant and a lesser defendant is rife with special difficulties of this sort. Indeed, in some cases joint representation has been used as a means of policing lesser figures in the conspiracy and ensuring that they not turn on the higher-ups. See Staff of President's Comm'n on Organized Crime, *Materials on Ethical Issues for Lawyers Involved with Organized Crime Cases* at 4-7 (1985). Thus, even apart from the adverse effects of the potential conflicts of interest on the three defendants represented by Iredale, the negative impact of Iredale's representation on the public perception of the fairness of the proceedings was sufficient to justify the district court's action in this case.[26]

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[26] Some of the difficulties that might have resulted from the joint representation were illustrated at trial when Iredale appeared in court with Bravo. Petitioner moved for a mistrial, arguing that since Iredale's name had been prominently mentioned as the lawyer who had cross-examined Vidal at a prior trial (while representing Gomez-Barajas) and since

2. Even if the Court were to determine that the district court abused its discretion [27] when it declined to permit Iredale to substitute as petitioner's counsel, petitioner's conviction should nonetheless be affirmed. Petitioner has failed to show any prejudice stemming from the district court's ruling. He has not challenged the effectiveness of his trial counsel nor "show[n] how specific errors of counsel undermined the reliability of the finding of guilt." *United States* v. *Cronic*, 466 U.S. at 659 n.26. Any such error, therefore, must be adjudged harmless.

Some courts of appeals have indulged a presumption of prejudice stemming from the wrongful denial of a defendant's choice of counsel.[28] But such a rule of automatic reversal is at odds with this Court's decisions applying Sixth Amendment principles.[29] This

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Bravo testified that he had pleaded guilty, the jury would assume that Iredale had concluded that, notwithstanding his cross-examination, Vidal was a credible witness. Tr. 728-732, 736-737.

[27] Because of the broad discretion granted to district courts under Rule 44(c), as well as their superior vantage point for assessing the potential for conflicts of interest in particular cases, we submit that a more exacting standard of review would be inappropriate.

[28] See, *e.g.*, Pet. App. 6; *United States* v. *Rankin*, 779 F.2d 956, 960-961 (3d Cir. 1986); *Linton* v. *Perini*, 656 F.2d at 211-212.

[29] Petitioner relies (Br. 63-64) on a long quotation from *Flanagan* v. *United States*, 465 U.S. at 267-268, as if it disposed of the question. It does not. In the section quoted, the Court was simply making the point that *if* the defendants' asserted right was like the right to the appointment of counsel, then prejudice would be presumed. The Court made clear that it was not resolving that issue when it stated, immediately after the passage quoted by petitioner, that even if petitioners' asserted right "is one that is not violated absent some specifically demonstrated prejudice to the defense," a disqualification order is still not immediately appealable. 465 U.S. at 268; see also *id.* at 269 ("whether or not petitioners' claim requires a showing of prejudice [to obtain a reversal of any subsequent conviction], a disqualification order does not qualify as an immediately appealable collateral order").

Court has repeatedly stressed that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. at 658. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland* v. *Washington*, 466 U.S. at 685. Petitioner does not dispute that he received such a trial here.

In certain limited circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" —such as "the complete denial of counsel" or "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"—this Court has not required a showing of prejudice because "there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *United States* v. *Cronic*, 466 U.S. at 658-659. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id.* at 659 n.26; see *United States* v. *Morrison*, 449 U.S. at 365. No such showing has been made here.[30]

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[30] Justice Brennan, concurring in the judgment in *Morris* v. *Slappy*, 461 U.S. at 28, has noted that "there is no way to

Petitioner was found guilty by a jury of his peers after a trial in which he was effectively represented by constitutionally adequate counsel. The fact that his preferred counsel was prevented from representing him because of conflicts of interest does nothing to cast doubt upon the reliability of that finding of guilt. It is clear that "the kind of testing envisioned by the Sixth Amendment has occurred" in this case

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know whether the character of the proceedings would have changed, whether counsel would have made different decisions, or whether the defense strategy would have been different if [counsel of choice] had represented [the defendant]. Conclusions based on inquiries into such questions would amount to nothing more than 'unguided speculation.'" We agree with that premise; no such speculative inquiry into "what might have been" is justified. We disagree, however, with Justice Brennan's conclusion that "[u]nder these circumstances, it is reasonable and just not to require a showing of prejudice" (*ibid.*). Rather, the Court's cases indicate that, absent a showing that counsel who actually represented petitioner provided ineffective assistance, so as to undermine the reliability of the judgment of guilt, petitioner received a fair trial. *Strickland* v. *Washington*, 466 U.S. at 687. That inquiry is highly concrete.

A rule of automatic reversal in this context would mark a reversion to a "sporting theory" of justice in which the ideal would be to make the two sides as evenly matched as possible. Instead, a criminal trial is, and should be, a search for truth in a fair proceeding. Petitioner had his day in court and was found guilty. Unless he can show that the trial he received was "unfair"—as measured against constitutional standards of adequacy and not against what some other counsel might have done—then that conviction should stand. See *Morris* v. *Slappy*, 461 U.S. at 15 ("A criminal trial is not a 'game,' and nothing in the record of [petitioner's trial] gives any support for the conclusion that he [is] constitutionally entitled to a new trial."). The Sixth Amendment does not distinguish different levels of constitutionally adequate representation.

(*United States* v. *Cronic*, 466 U.S. at 656). Accordingly, no legitimate theory of Sixth Amendment rights should require a rematch with players more to petitioner's liking.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY

BRIEF

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No. 87-4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MARK ERICK WHEAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

1. Whether Government-sought disqualification of defense counsel in a criminal case, after all potential conflicts were waived, violated the Sixth Amendment right to counsel.

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No. 87-4

IN THE
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MARK ERICK WHEAT,

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Respondent.

REPLY BRIEF

STATEMENT OF THE CASE

Government's References to the Record.

The Government exaggerates the role of Gomez-Barajas in petitioner's case. The Government's Brief (GB) states that Vidal worked for Gomez-Barajas (GB 2). Vidal testified he worked for Gomez-Barajas (2 RT 255), but there was no reference to the time, place, or connection with the petitioner. The Government's Brief adopts the

prosecutor's allegation that Gomez-Barajas was the ultimate supplier of marijuana (GB 3-4, 36), but the evidence at petitioner's trial revealed sources other than Gomez-Barajas. (BP[1] 22). The Government's Brief asserts that Gomez-Barajas "was petitioner's superior in the marijuana conspiracy" (GB 7) again without a foundation in the record.[2]

The Government contends that attorney Iredale was retained by petitioner and that Bravo, his other client, was "scheduled" or "likely" to testify in petitioner's trial (GB 7, 32, 35). Bravo was a co-defendant of petitioner scheduled to go to trial with him and would not have been a scheduled Government witness before deciding to enter

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[1] "BP" refers to Brief for the Petitioner.

[2] All references to Gomez-Barajas in petitioner's trial are set forth at BP 24-25, n.18. Reliance on statements made by Vidal from Gomez-Barajas' trial (where he was acquitted) are not part of the record; further, reliance on those allegations should be treated with skepticism, if not rejected, in light of Gomez-Barajas' acquittal. (JA 13).

his guilty plea. On the Thursday Bravo entered his plea of guilty, the prosecutor admitted that up to this point he was not scheduled to be a witness ("The government has not specifically made any plans to call him as a witness but that is, of course, always a potential." (JA 59)). On the following Monday, in the its written opposition to Iredale and at the disqualification hearing the Government first claimed it needed Bravo as a witness (JA 40, 71). Iredale was petitioner's choice as his attorney before Bravo became a Government witness.

The Government's Brief states that Bravo would provide evidence adverse to the petitioner (GB 32) and would give "valuable testimony" (GB 36, n.25). "Bravo delivered marijuana to Vidal, which Vidal in turn gave to petitioner (see Tr. 122, 302, 729, 733)." (GB 36, n.25). These references to the record are erroneous. The record reflects

that in March or June 1982 Bravo drove approximately 1200 pounds of marijuana from a Los Angeles hotel to Vidal's house in Bonita, California. (1 RT 121-122, 2 RT 302-303, 4 RT 729-735). Even though Vidal testified,[3] there was no evidence showing that this load was delivered to petitioner. Bravo's delivery to Vidal was not related to the Government's case against petitioner.

The Government's Brief states that Iredale received privileged or confidential information from Bravo about petitioner and would be impeded in his cross-examination of Bravo. (GB 32, 33, 36). At the time of the disqualification proceeding and at trial, the prosecutor knew before he called Bravo that Bravo could not identify petitioner. (JA 71; 4 RT 731). Iredale's statements that Bravo

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[3] During March - August 1982 Vidal testified that he was selling marijuana not only to petitioner but to Manuel Cretin-Sandoval, Victor Rasvena, John Cline, and other people whose names he did not remember. (1 RT 120-121).

did not know Wheat and had no potential evidence against petitioner (JA 57, 75) were not challenged, and Iredale as attorney for Bravo after being retained by petitioner pursuant to an agreement with the prosecutor did make Bravo available as a Government witness in petitioner's trial. (JA 40). Bravo testified, but was not cross-examined by defense counsel. (4 RT 735, 737-738). Since the defense never examined Bravo, there was never a need to impeach with confidential information. Iredale had also agreed not to impeach Bravo. (JA 75-76, 76). Because Bravo testified for the Government as required, the court imposed the lower sentence recommended by the prosecutor. (JA 11, 40, 47-48).

At the time of Bravo's plea of guilty, attorney Iredale stated in response to the prosecutor's guess that the petitioner might call Gomez-Barajas as a defense witness:

"Well, this is the first time I have ever heard of that. Mr. Gomez is not going to testify in an American courtroom ever again in his life." The district court promptly corrected: "Unless he is subpoenaed." (JA 65). At trial neither side requested his testimony nor subpoenaed him. Gomez-Barajas was never realistically considered as a witness in petitioner's case.

ARGUMENT

A. A Defendant in a Criminal Case is Entitled to a Fair Opportunity to Secure Counsel of his Choice under the Sixth Amendment.[4]

The Government properly recognizes that the adoption of the Sixth Amendment right to the assistance counsel expanded it beyond that in England. (GB 11-12). The American experience before and after the adoption of the Sixth Amendment (1791) clearly recognized, as a minimum, the right to select

[4] The Reply Brief follows the structure of the Government's Brief, but headings are phrased differently.

counsel of one's choice.[5]

The Government misconstrues the holding in **Andersen v. Treat**, 172 U.S. 24 (1898), "which suggests that the choice of a particular lawyer is not protected by the Sixth Amendment." (GB 13, n. 5). In **Andersen**, the defendant made no request for other assigned counsel, and, therefore, the allegation of the right to a particular counsel was not material.[6]

Morris v. Slappy, 461 U.S. 1 (1983),

[5] Prior to the adoption of the Sixth Amendment in the practice in the American colonies was that, "the right to counsel meant the right to retain counsel of one's choice and at one's own expense." Beaney, **The Right to Counsel in American Courts**, 21 (1955). "The constitutional provision meant, at a minimum, that defendants in federal courts had the right to retain their own counsel." **Ibid.**, 32.

[6] "The record did not show nor was there any pretense that the court was requested to assign Morris as counsel for Anderson, and denied the request; and if it were true that the district judge or district attorney suggested that it would be objectionable to do so in view of his employment by the other five members of the crew, even though coupled with the intimation that the court would decline on that ground to make such assignment, the fact was not material on this application." 172 U.S. 24, 31.

held that a denial of a continuance because of the lack of preparation of recently substituted appointed counsel, a different public defender from the same office who was prepared to try the case, was not a denial of counsel under the Sixth Amendment. If counsel was prepared, then a continuance was inappropriate simply to insure a "meaningful attorney-client relationship." Petitioner here requested no continuance. Attorney Iredale was immediately prepared to try the case with which he was familiar, but the court had to grant a short continuance so trial defense counsel could prepare. With no request for a continuance, **Morris v. Slappy** is inapplicable.[7]

What the Government fails to recognize is that the right to the effective assistance

[7] In **Chandler v. Fretag**, 348 U.S. 3 (1954), habeas corpus was granted because the defendant did not have an opportunity to obtain counsel on one charge. This court held: "A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard would be of little worth." 348 U.S. at 10.

of counsel under the Sixth Amendment (**United States v. Cronic**, 466 U.S. 648 (1984); **Strickland v. Washington**, 466 U.S. 668 (1984)) is inherently different from the right to counsel of choice. The issue of minimally competent representation is an issue measurable from record, which may be examined for prejudice. Because defense strategy involves so many variables, courts are understandably deferential to claims of unsatisfactory performance. However, the right to select an attorney is the right to choose skill, experience, and a relationship of trust and understanding. It is measurable on appellate review only one from one perspective: Was it honored or denied? There is no right to counsel of choice when it is denied by the trial court and then judged by an appellate court from a harmless error standard. This Court found that the Sixth Amendment right of self-re-

presentation[8] is not subject **Cronic-Strickland** analysis. The right to counsel of choice is most like the right to choice of self-representation, rather than an right to minimum effective assistance of counsel.

Faretta v. California, 422 U.S. 806, 819, 821, 832 (1975), held that the Sixth Amendment implied the right of self-representation. This court implemented the Founding Fathers' incorporation of the fundamental right of free choice. "And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." 422 U.S. at 833-834. The right to self-representation and right to counsel of choice both reflect the judgment of an accused which he should be permitted to

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[8] In **Faretta v. California**, 422 U.S. 806 (1975), the defendant over objection was denied the right to proceed pro per, and although he was represented by a public defender whose effectiveness was not challenged, this Court reversed.

make. What this Court said in **Faretta** applies with equal force to the right to counsel of choice:

> An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense. 422 U.S. at 821.[9]

In **Flanagan v. United States**, 465 U.S. 259 (1984),[10] this court held that the assessment of the right to counsel of choice was best considered after "the substance of the prosecution's and defendant's cases is known." 465 U.S. at 269. Posttrial analysis in this case is especially valuable in seeing how superficial and speculative were the prosecutor's reasons for seeking disqualifica-

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[9] This quote was cited in **McKaskle v. Wiggins**, 465 U.S. 168, 173-174 (1984).

[10] The Government's Brief addresses this Court's opinion only in the footnotes (GB 12 n. 5, 29 n. 20, 38 n. 29), but cites the supplanted lower court opinion of the dismissed appeal in the text. (GB 26).

tion of Iredale. The prosecution used Bravo as an excuse to defeat the petitioner's choice of counsel. The judge himself had no objection unless the prosecutor voiced one. (JA 64). Before trial the district judge relied on the exaggerated and unfounded claims of conflict by the prosecutor, but trial defense counsel, who never cross-examined Bravo, repeated after his testimony that the disqualification of Iredale because of Bravo's being called as a witness had no basis (5 RT 754-755).

After the trial it is much easier to recognize the prosecutorial manipulation and the highly speculative nature of his objections.[11] Bravo's testimony never affected

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[11] Recently in the context of disqualification of counsel in a civil case, this Court shared the concern of the appellate court about the "tactical use of disqualification motions" to harass opposing counsel. **Richardson-Merrell, Inc. v. Koller**, 105 S.Ct. 2757, 2764 (1985). **A fortiori**, in a criminal case with the duty to enforce the Sixth Amendment, this Court should be sensitive to such manipulation of defense counsel.

petitioner, and Gomez-Barajas, who was never claimed to be a witness for either side, was sentenced according to his "locked-in" plea bargain.

The Government's contention that all criminal defense lawyers are fungible denigrates the role of defense counsel in modern society. (GB 10-11). The petitioner sought counsel, Iredale, who was an outstanding advocate with proven success in examining the Government's witnesses in this case. The Government contends there is no right to choice of counsel - - only the bare Consitutional minimum of effectiveness which this Court reviews with deference toward the attorney.[12] In setting the Constitutional minimum, this Court has recognized that in appointed federal cases the courts have supervisory power to appoint counsel more

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[12] "Judicial scrutiny of counsel's performance must be highly deferential." **Strickland v. Washington**, 466 U.S. 668, 689.

qualified than constitutionally compelled.[13]

The right to retain counsel includes the right to choose counsel. There is no choice if the accused is forced to accept only an attorney approved by his adversary and who satisfies the constitutional minimum. The freedom to choose is the accused's personal power to select the best attorney who can best defend him against the awesome power of the state. To permit the state, and specifically the prosecutor, to defeat the accused's avowed choice of counsel because the prosecution perceives it is in the accused's best interest undermines the very purpose of the Sixth Amendment to provide the accused protection against the overreaching by the state.

Those accused by the Government expect to choose the most qualified counsel they may

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[13] **United States v. Cronic**, 466 U.S. 648, 665, n. 38.

afford which is inherent in the Sixth Amendment: "In all criminal prosecutions, the accused shall <u>enjoy the right</u> . . . to have the assistance of counsel for his defense." The Government contends that the language should be interpreted to "suffer the right." The simple definition of "enjoy" is "to have for one's use, benefit, or lot; to take pleasure or satisfaction in."[14] The petitioner was denied the benefit of his choice of superior counsel in defiance of the express wording of the Sixth Amendment.

<u>B. Whatever Reasonable Limitations May Attach to the Right to Counsel of Choice Were Not Applicable in this Case</u>.

Petitioner contends that the right to counsel of choice is similar to the right of self-representation under **Faretta**. The right under **Faretta** could be limited to permit a minimal role for advisory counsel.

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[14] **Webster's Ninth New Collegiate Dictionary** 413 (1984).

McKaskle v. Wiggins, 465 U.S. 168 (1984). Attorney Iredale was admitted to practice in the district court (his qualifications were not challenged), and he sought no continuance, which often might be the case with new counsel unfamiliar with the case. The right of choice includes a reasonable time to secure counsel of one's choice, but that right should not become a tool to unfairly delay the trial. Attorney Iredale was sensitive to the scheduled trial date and asked for not "a single minute of continuance." (JA 92). Restrictions on the right of choice based on timeliness are not applicable in the instant case.

The Government contends the district court has power to disqualify defense counsel who "would unfairly prejudice the Government."[15] (GB 17). For this proposition the

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[15] Would a newly appointed Assistant United States Attorney be able to have the court disqualify opposing counsel who had too much criminal law experience?

Government relies on **United States v. Washington**, 797 F.2d 1461 (9th Cir. 1986). (GB 17 n. 12). In **Washington** the prosecution alleged that defense counsel had received confidential information about the case in their former roles as prosecutors. The defense counsel denied receiving such information and stated there was no conflict. Without resolving the factual dispute, the district court disqualified defense counsel because of the appearance of impropriety.

Washington held that the Government "bears a heavy burden" to establish the loss of integrity of the judicial process to justify the disqualification of chosen defense counsel. 797 F.2d at 1465. It reversed and remanded for a hearing as to whether counsel received confidential information because the trial judge erred in reliance on the "appearance of impropriety." If the disqualification were improper, a new trial

was to be ordered because a showing of prejudice is not required. 797 F.2d at 1466-1467.

Iredale was not a former federal prosecutor privy to confidential Government information about the case. The district court, which relied on the "representations" of the prosecutor, did not require the prosecution to satisfy its "heavy factual burden," and disqualified Iredale because of the appearance of impropriety. Since the Government cannot demonstrate a factual basis for those unique grounds, it cannot prevail here. There is no open-ended discretionary ground for disqualification of defense counsel based on "appearance."

C. Iredale's Sequential Representation of Petitioner Would Not Have Violated Ethical Standards or Undermined the Integrity of the Trial Process.

1. Multiple Representation May Benefit an Accused in a Criminal Case, and the Accused Should Have the Right to Choose.

The Government fails to recognize the

application of **Cuyler v. Sullivan**, 446 U.S. 335 (1980), to this case. The Government asks this court to equate "potential conflict" with "actual conflict" (GB 8-9, n. 3), the same mistake the court of appeals made in **Cuyler**. The court of appeals held that some showing of a possible conflict of interest or prejudice, however remote, interfered with the right of counsel in a criminal case. This Court required "an actual conflict of interest adversely affect[ing] his lawyer's performance." 446 U.S. at 348 and 350.

Cuyler and **Holloway** both recognize the advantage of multiple representation in a common defense. Although in many cases, individual representation will be preferred, the accused should have the option to secure counsel who may have assisted other defendants. In the federal courts, Fed. R. Crim. Proc. 44(c), mandates a court inquiry to alert defendants represented by common counsel so

as to permit them to seek separate counsel or intelligently choose to remain with that attorney. In this case, Iredale was the first to point out the need for such an inquiry. (JA 58).

The Government characterizes multiple representation as "professionally questionable representation" (GB 10) and questions the integrity of the private bar to properly educate joint defendants adequately or to withdraw in cases in which multiple representation involves serious conflicts (GB 20). However, the Government regularly relies on **Miranda** waivers of counsel obtained after brief advice of rights by policemen, yet unfairly impugns the defense bar in general as to its willingness to accurately advise clients of their rights.

There was no showing of an ethical violation of any kind in this case.[16] **Cuyler** held that absent special circumstances trial courts may assume multiple representation entails no conflict and that the attorney representing multiple defendants is in the best position to determine when a conflict exists or may develop at trial. 446 U.S. at 346-347.

Cuyler held that separate trials "significantly reduced the potential for a divergence in [multiple defendants'] interests. 446 U.S. at 347. Iredale never agreed to represent both Bravo and petitioner in the scheduled jury trial but did so only after

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[16] The Government cites the ABA professional standards, but even the most restrictive of those standards permits multiple representation "in unusual circumstances." Iredale's skill and experience were an unique advantage that qualified as an exceptional circumstance. All the standards permitted joint representation with the informed consent of the parties. Here, the district court refused to consider the waivers and flatly prohibited the sequential representation. The district court went far beyond the requirements of professional standards in granting the prosecutor's request to disqualify Iredale.

Bravo pleaded guilty. By doing so he greatly reduced the potential for divergence of interests.

This case does not present an issue of simultaneous representation, and the Government's contention for perpetual automatic disqualification of counsel in sequential representation could have serious adverse consequences for large public defender offices with large clienteles. An unscrupulous prosecutor could disqualify the whole defender office if any of its attorneys ever represented one of the prosecution's witnesses in the past. If the witness were represented many years previously on even a minor offense, the prosecutor could still disqualify the office even if the attorney was no longer working at the public defender office and the file was in storage. If the court adopts the Government's position that multiple representation is absolutely or presumptively

evil, the power to disqualify would rest with the prosecutor even though the prosecution witness might not object.

The accused and the public may have a difficult time determining that the loss of his public defender attorney was for his own good. **Holloway** granted relief because the defense lawyer, not the prosecutor, claimed a conflict existed. **Holloway** recognized that multiple representation in some cases may be advantageous to an accused.

2. A Potential or Speculative Conflict of Interest May be Waived by All Parties.

The Government concedes that an accused may waive his right to conflict-free counsel, but argues that the court may reject a knowing waiver. (GB 24). In **Singer v. United States**, 380 U.S. 24 (1965), this Court held the defendant did not have a right to demand a bench trial because he could waive a jury trial. **Singer** is distinguishable, for there is no constitutional right to trial by a

judge. **Faretta v. California**, 422 U.S. 806, 819 n. 15. There is a constitutional right to counsel. Also, all would recognize that a defendant could intelligently waive the requirement for a 12-person jury and accept a verdict by a lesser number.[17] In the same fashion the defendant could employ an attorney who may owe simultaneous obligations of loyalty to others.

The record reflects neither unprofessional nor unethical conduct nor undermining of the integrity of the trial process. The vague and speculative concerns of the prosecutor were brought to the attention of the petitioner and the two co-defendants awaiting sentence. They desired to waive

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[17] "It follows that we must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing." **Patton v. United States**, 281 U.S. 276, 290 (1930)(waiver of less than 12-person jury approved). See also Fed. R. Crim. Proc. 23(b).

them. There was nothing peculiar to these alleged potential conflicts that could preclude waiver.

The Government cites **United States v. Diozzi**, 807 F.2d 10 (1st Cir. 1986), for the district court's discretionary authority to disqualify counsel (GB 25) but failed to mention the appellate reversed for improper disqualification. The prosecution called defense counsel as witnesses and then sought to disqualify them. Because alternative proof (a stipulation) existed, the prosecution did not meet its heavy burden to show cause for disqualification.[18]

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[18] The Government cites other cases with significant factual differences and results contrary to its position in this case: **United States v. O'Malley**, 786 F.2d 786, 788 (7th Cir. 1986)(other client objects); **United States v. Reese**, 699 F.2d 803 (6th Cir. 1983) (hearing must precede disqualification; disqualification improperly based on Government beliefs; voluntary waiver of conflict must be honored absent compelling circumstances); **United States v. Agosto**, 675 F.2d 965 (8th Cir. 1982)(rejection of irrefutable presumption from multiple representation; rejection of per se prohibition against waivers; use of other means to eliminate conflict short of disqualification); **In re Grand Jury Subpoena Served Upon**

If the accused makes a knowing and intelligent waiver of the potential conflict, it should be honored. In this case the district court refused to conduct a hearing as to the conflict allegations ("representations") or to consider a waiver. The "representations" of vague, speculative conflicts regarding the two defendants whose cases had been terminated except for sentencing were capable of being waived.

3. The Courts Acceptance of Waiver of Potential Conflicts by All Parties Preserves the Right to Counsel of Choice and is Final.

The Government recognizes the efficiency and finality of an effective waiver which

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Doe, 781 F.2d 238 (2d Cir. 1986)(en banc)(attorney's records subpoenaed; in limine disqualification hearing required in which judge weigh's information sought by subpoena against loss of counsel of choice); **United States v. Ditommaso**, 817 F.2d 201 (2d Cir. 1987)(moving party to disqualify was former client); **In re Paradyne**, 803 F.2d 604 (11th Cir. 1986)(grand jury type hearing not satisfactory in determining conflict to disqualify defense counsel); **United States v. Padilla-Martinez**, 762 F.2d 942 (11th Cir. 1985)(waiver possible, but no waiver when attorneys failed to disclose the real party who paid fees).

would forever bar the conflict claim. (GB 29 n. 20). All the arguments made by the Government now about the ability of an accused to make such a choice were addressed in **Faretta**. In **Faretta** the lower court found he had not made a knowing and intelligent waiver, but this Court found he did not have to have the skill of the lawyer to make that choice. 422 U.S. at 835-836. In the federal courts, the judge must make inquiry under Rule 44(c), and the attorney is also bound to evaluate the impact of any alleged conflict. As in all decision-making there is risk in the waiver. If apprised of the risks, known and unknown, and the accused wishes to proceed with a particular lawyer, that choice should be honored.[19]

An excellent example of a waiver pro-

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[19] Although actual conflicts may also be waived, that is not the issue here. The petitioner asserts that he had the right to waive the highly speculative conflicts alleged by the prosecutor in this case.

cedure is set forth in **United States v. Krebs**, 788 F.2d 1166 (6th Cir. 1986).[20] In **Krebs** the court inquired as to the potential conflict of counsel because of counsel's possible involvement in the criminal activity. The court required an affidavit of the defendant waiving his right to conflict-free counsel. The court told the defendant he might not be aware of all the potential conflicts at the time. The court further informed the defendant that the waiver foreclosed appellate review. The court of appeal affirmed the

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[20] The Government cites **United States ex rel. Tonaldi v. Elrod**, 716 F.2d 431 (7th Cir. 1983). (GB 28, 29 n. 20). In **Elrod**, the court found a valid waiver because the defendant made the choice with his eyes wide open and relied on **Faretta**. 716 F.2d at 437, 439. The court effectuated the waiver to permit the defendant counsel of his choice: "Indeed, one could say that the petitioner in this case did not <u>waive</u> the right to counsel unaffected by conflict, so much as he <u>asserted</u> the right his right to select his own attorney. As Judge Friendly recently wrote, "the defendant's choice of joint representation, like that of self-representation, may sometimes seem woefully foolish to the judge. But . . . the choice is mainly theirs; the judge . . . is <u>not</u> to assume too paternalistic an attitude in protecting the defendant from himself." 716 F.2d at 439.

waiver relying on language from **Johnson v. Zerbst**, 304 U.S. 458, 468 (1938) repeated in **Edwards v. Arizona**, 451 U.S. 477, 482 (1981).[21]

The Government contends that the petitioner sought an unfair trial and an unfair conviction. (GB 30, 31). The petitioner only sought to have counsel of his choice, Iredale, represent him at a fair trial so that he might avoid the conviction.

A knowing and understanding waiver of the right serves to eliminate the need for counsel at any stage of the criminal proceeding: from police interrogation to a direct appeal. To assist in petitioner's decision to waive the alleged potential conflict he

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[21] This Court stated that "waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case including the background, experience and conduct of the accused." quoted in **Krebs, supra**, 788 F.2d at 1173.

had separate counsel to evaluate the conflict and who concurred in the retention of this demonstrably successful advocate.[22] The right of waiver in this context implements the right to counsel of choice -it gives the defendant a benefit, not a burden. Once the waiver is effectively made, it ends once-and-for-all later disputes, either in appeal or post-conviction proceedings. Waiver is simple to understand, fair, efficient, and final. The refusal to consider the waiver denied the petitioner counsel of his choice and permitted the prosecution to select defense counsel of its choice.[23]

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[22] The trial judge had characterized Iredale's performance in the previous trial as "fantastic," and said that if he were in the petitioner's position, he would have wanted Iredale to represent him. (JA 124-125). If the petitioner had Iredale as his attorney, he would be doing more "than buying a pig in a poke." See GB 28.

[23] The district judge stated to trial defense counsel: "What the Government is doing is saying they don't want Mr. Iredale and we should proceed to trial with you." (JA 90).

D. Iredale's Sequential Representation Was Designed to Minimize and Avoid Conflict, and the Prosecutor Created the Speculative Conflict to Avoid Battle With His Previously Successful Opponent.

1. Without a Hearing on the Validity of the Prosecutor's Allegations of Conflict, the Court Disqualified Immediately Available Counsel of Choice on the Most Speculative Conflicts and Refused to Consider Waiver.

The Government contends the district court "carefully balanced" the petitioner's right to use Iredale with competing considerations. (GB 32). There was no "balancing" because the court "based upon the representations of the Government . . . the Court really has no choice at this point other than to find an irreconcilable conflict of interest." (JA 100)(Emphasis added). The district court found an irrefutable presumption of conflict that could not be waived. (JA 100).

The Government misunderstands the prosecutor's calling of Bravo, for this was done only after Iredale had been retained

by petitioner. The defense had no need to cross-examine (and other counsel did not do so) or impeach Bravo, for he had no evidence relating directly to petitioner. If the record is clear that Bravo did not know the petitioner it is sheer speculation to say that Iredale derived confidential information from Bravo about petitioner or vice-versa.[24] The Government constructs hypothetical situations that might be addressed in other situations, but this Court must respond to this particular case and controversy.[25]

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[24] As in the Government cited case of **United States v. Diozzi**, 807 F.2d 10 (1st Cir. 1986), the district court here could have set parameters on the nature of the questioning of Bravo or considered an alternative form of proof. In this case the Government has Bravo's factual statement given at the time of the plea of guilty (JA 53-54), and this transcript, supplemented if necessary by any admissions or confessions he made, could be used in lieu of calling Bravo. Unlike the situation in **Diozzi**, in which the defense lawyers might also be witnesses, Bravo could still be examined by Iredale on his non-controversial testimony.

[25] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies to which the United States shall be a Party." Article

The Government's speculation as to the motivations of Bravo (GB 33) - - given his limited knowledge and full, complete, and Government-rewarded testimony - - is clearly at odds with the record in this case. Bravo and petitioner did not exchange benefits. Bravo permitted petitioner to use Iredale once Bravo had achieved resolution of his case.

Iredale was ethically sensitive and comported with **Cuyler's** recognition that sequential representation reduces potential conflicts, for he awaited resolution of Bravo's as well as Gomez-Barajas' case before he became available for petitioner. Iredale made his appearance at the first available

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III, Section 2, **The Constitution of the United States.** The Government's concerns are not unwarranted but are not applicable to this case (i.e., influence of organized crime family on selection of counsel (GB 37)). Rather than the Government seeking an advisory opinion from this court, the tradition of judicial restraint would dictate awaiting review of those cases and deciding this one on the question presented.

opportunity, and no continuance of the scheduled trial on his account was required. On Thursday at Bravo's plea of guilty the judge entertained no objection (JA 64), but the following Monday deferred to the prosecution's objection.

Once the district court had made its final ruling (JA 100-101) it understandably did not wish to reconsider again the need for a hearing (GB 34-35 n. 24; JA 119-120 "I just think its too late to get involved in this."). The court permitted a hearing only to hear the prosecutor's objection to Iredale (Monday); the court could have as easily considered the validity of the allegations of conflict, the effectiveness of the waivers, and other means short of disqualification of counsel of choice. The hearing need only determine the nature of the alleged potential conflict (already alleged in the prosecutor's memorandum which was relied upon by

the court), obtain a valid waiver,[26] and determine what means short of disqualification might be appropriate to balance any competing interests. When all parties to the joint representation have waived any conflict, and two of them for all practical purposes are out of the fray and awaiting an agreed upon or Government recommended sentence, the inquiry would be short. The estimate of one hour in the context of this case is not unreasonable. In different hypothetical situations described by Government not related to this record, the hearing could conceivably be longer. The use of the waivers would shorten the process. The issue in this case was the need for a hearing, and the district court erroneously held that no hearing was necessary.

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[26] The inquiries securing valid waivers upheld in **United States v. Krebs**, 788 F.2d 1166 1168-1169 (6th Cir. 1986), and **United States ex rel. Tonaldi v. Elrod**, 716 F.2d 431, 432-433 (7th Cir. 1983), would require only a few minutes.

Although the court disqualified counsel of choice, it was aware of the serious constitutional issue and the lack of Ninth Circuit precedent and wished to give counsel an opportunity to seek a writ in the Ninth Circuit. (JA 98-99, 101). Both the prosecutor and Iredale advised the court that pretrial interlocutory review was foreclosed by **Flanagan**. (JA 101-102). All parties and the court knew that the court had ruled on the merits of the disqualification issue.

The sinister claims of the Government about precluding witness testimony is totally belied by the record that shows complete cooperation by Iredale with the prosecutor in making Bravo available for petitioner's trial. No difficulty existed, because Bravo had nothing to say about petitioner.

It was not the petitioner or Iredale manipulating Bravo, but rather the prosecutor using Bravo, a witness he never previously

intended to call, to remove Iredale. This was a conflict constructed by the prosecutor in effort to avoid doing battle with Iredale again. A hearing would have revealed the manufactured nature and remoteness of this alleged potential conflict which could have been discounted or waived, if necessary.

Public confidence would be eroded by the prosecutor's use of the non-witness Gomez-Barajas as a basis for disqualification of counsel of choice. Neither side called him, and the references to him in petitioner's trial were inconsequential. Without any reference to the record the Government speculates under the guise of public perceptions that the multiple representation was "engineered" to prevent Gomez-Barajas from being called as a possible defense witness. (GB 36). For what purpose? Would the defense call Gomez-Barajas to testify he was the alleged source of Vidal's marijuana, when

Vidal failed to name him as a source? In the context of the record how would Gomez-Barajas be embarrassed by petitioner's defense when he had been acquitted on the marijuana charges and had an agreed disposition on the remaining charges?

The Government's conjecture includes the higher-ups in a conspiracy controlling the lesser figures. (GB 37). Iredale was not foisted on petitioner. After Iredale's successful defense of Gomez-Barajas, petitioner sought out Iredale for the express purpose of representing him at the jury trial. Gomez-Barajas' case was resolved, and petitioner had separate counsel who concurred in his employment of Iredale as the trial attorney.

2. Disqualification of Counsel of Choice Requires Reversal without a Showing of Prejudice.

The Government contends that **Flanagan** left open whether a requirement of prejudice

is required if counsel of choice is improperly denied. (GB 38-39, n. 29). The court's principal focus was whether the pretrial disqualification was an appealable order. **Flanagan's** comparison of the right of self-representation with the right of counsel of choice (465 U.S. at 267-268) has been recognized by this Court and every court of appeals which has considered the issue.

In **United States v. Cronic**, 466 U.S.648, 658 n. 9 (1984), this Court stated: "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." (Citing **Flanagan**). If the court finds the right to counsel of choice, to review only for effectiveness of counsel would be non-responsive to the wrong and make the right illusory. The court must guarantee the right to be more than a mummery of words.

All those circuit courts of appeal that have addressed posttrial review of disqualification of counsel in a criminal case after Flanagan hold that prejudice need not be shown.[27]

The Government contrariwise contends the adherence to this unanimous judicial precedent - - that a showing of prejudice is not required - - would be a retrogression to a "'sporting theory' of justice in which the ideal would be to make the two sides as evenly matched as possible." (GB 40 n. 30).

The adversarial search for truth is premised on substantial parity between the advocates to insure that the "full story" (truth) will be presented by both sides at the trial. The Government suggestion the prosecutor's removal of the defendant's

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[27] **United States v. Diozzi**, 807 F.2d 10, 16 (1st Cir. 1986); **United States v. Harvey**, 814 F.2d 905, 926 (4th Cir. 1987); **Wilson v. Mintzes**, 761 F.2d 275, 285-286 (6th Cir. 1985); **United States v. Washington**, 797 F.2d 1461, 1467 (9th Cir. 1986).

chosen champion, which would give the prosecution a decided advantage, merits no remedy makes the phrases "fair trial" and "day in court" labels without meaning. The Sixth Amendment right to counsel of choice is a constitutional protection afforded every accused against the power of Government. The right to choose one's own <u>independent</u> zealous advocate to challenge the Government cannot be preserved by testing this fundamental denial of that right by a harmless error or prejudice test. Here the constitutional right to choice of counsel was violated - - that was the prejudice. Nothing further need be shown.[28]

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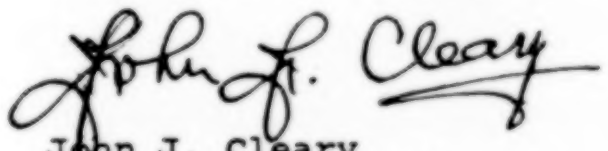
[28] The co-defendant Gomez-Barajas faced substantially the same principal Government witnesses and with the assistance of Iredale was acquitted. If petitioner had Iredale would he too have been acquitted. A plea bargain was almost reached on behalf of petitioner, and might not Iredale, who had proved so successful before with the same witnesses, induced the prosecution to accede to the plea bargain. These imponderables should not be resolved against the petitioner.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court for a new trial in which petitioner would enjoy the right to counsel of his choice.

Respectfully submitted,



DATED: 20 Jan 88

John J. Cleary
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